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THE RULE OF DAMAGES IN ACTIONS EX DELICTO.

[In the February number (vol. v. p. 193,) we republished from the Law Reporter, an article from the pen of Theodore Sedgwick, in reply to one by Professor Greenleaf, questioning the doctrine laid down by Mr. Sedgwick in his late work on Damages—that in certain actions of tort the plaintiff may recover vindictive or punitory damages, and reaffirming that doctrine. Mr. Greenleaf has requested us to republish his article, in order that both sides may be heard. We do so with pleasure, not only because it is an act of justice, but because we know of no more important matter now in controversy among the profession. Mr. Greenleaf has referred us to a note to the second edition of the second volume of his admirable work on Evidence, for an emended statement of his views as originally presented. We are reluctantly compelled to omit some paragraphs, in order to bring the article within our limits. Eds.]

Since the first edition of this volume, Mr. Sedgwick has given to the profession a valuable treatise on the Law of Damages, in which he denies the soundness of the general rule here stated, and lays down the broad proposition, that "wherever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages *not only to recompense the sufferer, but to punish the offender.*" *Sedgwick on Damages, p.* 39. However this view may appear to be justified by the general language of some Judges, and by remarks gratuitously made in delivering judgment on other questions, it does not seem supported to that extent by any *express decision on the point*, and is deemed at variance not only with

adjudged cases, but with settled principles of law. This will be apparent from an examination of the authorities on which the learned author relies.

In the first case cited, in support of his position, that of *Huckle* v. *Money*, 2 *Wils.* 205, which was an action to try the legality of an arrest under a general warrant issued by the Secretary of State, the jury found a verdict for £300, which the defendant moved the Court to set aside as excessive. But the motion was denied on the ground that the damages were properly left at large to the jury, with instructions that they were not bound to any certain rule, but were at liberty to consider all the circumstances of oppression and arbitrary power by which the great Constitutional right of the plaintiff was violated, in this attempt to destroy the liberty of the kingdom. All which the jury were thus permitted to consider, were circumstances, going in aggravation of the injury itself which the plaintiff had received, and so were admissible under the rule as stated in § 266, 272, of the text. The case of *Tullidge* v. *Wade*, 3 *Wils.* 18, was of the same class. It was trespass for breaking and entering the plaintiff's house, and debauching his daughter; and the jury were instructed to take into consideration the plaintiff's loss of her service, and the expenses of her confinement in his house. The verdict, which was for £50, was complained of as excessive; but the Court thought otherwise, "*the plaintiff having received this insult in his own house*, where he had civilly received the defendant, and permitted him to make his addresses to his daughter." And it was observed by Bathurst, J., that "in actions of this nature, and of assaults, *the circumstances* of time and place, when and where *the insult* is given, require different damages; as it is *a greater insult* to be beaten upon the Royal Exchange, than in a private room." It thus appears that, in this case, the damages were limited to the extent of the *injury received by the plaintiff;* and that the remark of Wilmot, C. J., relied on by the learned author, was altogether *gratis dictum.* In *Doe* v. *Filliter*, 13 *M. & W.* 47, which was trespass for mesne profits, the only question was, whether, in estimating the costs of the ejectment, as part of the plaintiff's damages, the plaintiff was confined to the costs taxed, or might be allowed the costs as between attorney and client. The remark of Pollock, C. B., respecting "what are *called* vindictive damages," though wholly gratuitous, is explained by himself to mean only that the jury may "take *all the circumstances* into their consideration," viz., the circumstances of the *injury inflicted*, so far as they affected the plaintiff.

The like may be observed of what Mr. Justice Washington said in *Walker* v. *Smith*, 1 *Wash. C. C. R.* 152, which was an action against the plaintiff's factor, to recover the balance due to the plaintiff for goods which the factor had sold without taking collateral security, in violation of orders, the purchaser proving insolvent, and partial payment only having been obtained. The question was, whether the jury might assess damages in their discretion, for less than plaintiff's actual loss, taking into consideration all the favorable circumstances on the defendant's part, or whether they were bound to give the plaintiff the precise sum which he had lost by the violation of his orders. And the Judge instructed them that the latter was the sole measure of damages; remarking, passingly, that in suits for vindictive damages, the jury acted without control, because there was no legal rule by which to measure them. His meaning apparently was, that in actions "sounding in damages," the Court had *no control* over the sound discretion of the jury; but that where the damages were susceptible of a fixed and certain rule, the jury were bound by the instructions of the Court. The case of *Tillotson* v. *Cheetham*, 3 *Johns.* 56, is also relied upon. This was case for a libel, in which the jury were instructed by Kent, C. J., "that the charge contained in the libel was calculated not only to injure *the feelings* of the plaintiff, but to destroy *all confidence* in him as a public officer, and in his opinion demanded from the jury exemplary damages, as well on account of the nature of the *offence charged* against the plaintiff, as for the *protection of his character as a public officer*, which he stated as a strong circumstance for the increase of damages;" adding, "that he did not accede to the doctrine that the jury ought not to punish the defendant, in a civil suit, for the pernicious effects which a publication of this kind was calculated to produce in society." Here the grounds of damages, positively stated to the jury, were expressly limited to the degree of *injury to the plaintiff*, either in his feelings, or in his character as a public officer. The rest is mere negation. The jury were not instructed to consider any other circumstances than those which affected the plaintiff himself; though *these*, they were told, demanded exemplary damages. In this view, all damages in actions *ex delicto*, may be said to be exemplary, as having a tendency to deter others for committing the like injuries. These instructions therefore were in accordance with the rule already stated. In support of them, the Chief Justice relies on *Huckle* v. *Money*, and *Tullidge* v. *Wade*. He also refers to *Pritchard* v. *Papillon*, 3 *Harg. St. Tr.* 1071; 10 *Howell St. Tr.* 319, 370, *S. C.*, which was

essentially a controversy between the crown and the people, before "the infamous Jeffries;" who told the jury that "the government is a thing that is infinitely concerned in the case, that makes it so *popular* a cause;" and pressed them, with disgraceful zeal, to find large damages for that reason, and for their compliance in finding £10,000, which was the amount of the *ad damnum*, he praised them as men of sense, to be greatly commended for it. The ruling of that Judge, in favor of the crown, will hardly be relied upon at this day as good authority. But in *Tillotson* v. *Cheetham*, the learned Chief Justice, in saying that the actual pecuniary damages in actions for tort, are never the sole rule of assessment, probably meant no more than this, that the jury were at liberty to consider all the damages accruing to the plaintiff from the wrong done, without being confined to those which are susceptible of arithmetical computation. The remark of Spencer, J., beyond this, was extrajudicial. In *Wooert* v. *Jenkins*, 14 *Johns.* 352, which was trespass, for beating the plaintiff's horse to death, with circumstances of great barbarity, the jury were told that they "had a right to give *smart-money;*" by which nothing more seems to have been meant than that they might take into consideration the circumstances of the cruel act, as enhancing the injury to the plaintiff by the laceration of his feelings. In the *Boston Manufacturing Co.* v. *Fiske*, 2 *Mason R.* 119, the only question was, whether, in case for infringing a patent, the plaintiff might recover, as part of his actual damage, the fees paid to his counsel for vindicating his right in that action. The observations of the learned Judge, quoted by Mr. Sedgwick, were made with reference to the practice in admiralty, in cases of marine torts and prize, where a broader discretion is exercised than in Courts of common law, the Court frequently settling in one suit all the equities between the parties in regard to the subject matter. The next case adduced is that of *Whipple* v. *Walpole*, 10 *N. Hamp. R.* 130, which was case, against the town of Walpole, to recover damages for an injury arising from the defective state of a bridge, which the defendants had grossly neglected to keep in repair. The bridge had broken down while the plaintiff's stage coach was passing over, in consequence of which his horses were destroyed. The jury were instructed, "that for ordinary neglect, the plaintiff could not recover exemplary damages; but that such damages might be allowed in the discretion of the jury, in case they believed there had been gross negligence on the part of the defendants." The question seems in fact to have been, whether the jury were confined to the value of the

horses, or might take into consideration all the circumstances of the injury. The sole question before the Court in Bank was, whether the above instruction was correct; and they held that it was. The remark that the jury might give "damages beyond the actual injury sustained, for the sake of the example," though gratuitous and uncalled for, seems qualified by the subsequent observation, that the jury, in cases of gross negligence, "were not bound to be *very exact* in estimating the amount of damages;" and probably the learned Judges meant to say no more than that, in such cases, the Court would not control the discretion of the jury, but would leave them at liberty to consider all the circumstances of the injury, and award such damages as they thought proper. In *Linsey* v. *Bushnell*, 15 *Conn. R.* 225, which was case for an injury to the plaintiff's person, occasioned by an obstruction left in the highway by the wanton negligence of the defendant, the question was, whether the jury, in the estimation of damages, were restricted to the loss of the plaintiff's time, and the expenses of his cure, &c., or might also allow, as part of his damages, the necessary trouble and expenses incurred in the prosecution of his remedy by action. And the Court held that these latter were fair subjects for their consideration. "The circumstances of aggravation or mitigation," said the Court—"the bodily pain, the mental anguish, the injury to the plaintiff's business and means of livelihood, past and prospective; all these, and many other circumstances may be taken into consideration by the jury, in guiding their discretion in assessing damages for a wanton personal injury. But these are not all that go to make up the amount of damage sustained. The bill of the surgeon, and other pecuniary charges, to which the plaintiff has been necessarily subjected by the misconduct of the defendant, are equally proper subjects of consideration." And it is in express reference to the propriety of allowing the trouble and expense of the remedy, that the observation respecting vindictive damages, or smart-money, quoted by Mr. Sedgwick, seems to have been made. For the learned Judge immediately cites, in support of his remark, certain authorities, which will be hereafter mentioned, not one of which warrants the broad doctrine which is now under consideration; and he concludes by quoting from one of them, with emphasis, the admission, that "where an important right is in question, in an action of trespass, the Court have given damages to indemnify the party for the expense of establishing it." This is conceived to be the ex

tent to which the law goes, in civil actions for damages, beyond the circumstances of the transaction.

The learned author further observes, that the doctrine he lays down, has been fully adopted by the Supreme Court of the United States, and cites *Tracy* v. *Swartwout*, 10 *Pet. R.* 80. That was an action of trover against a collector of the revenue, for certain casks of syrup of sugar-cane, which the importer had offered to enter and bond at the rate of fifteen per cent. ad valorem, but the collector, acting in good faith, required bond for a duty of three cents per pound. The importer refusing to do this, the goods remained in the hands of the defendant a long time, waiting the decision of the Secretary of the Treasury; who, being of opinion that the lighter duty was the legal one, they were accordingly delivered up to the importer at that rate of duty, but in the mean time had become deteriorated by growing acid. The Judge of the Circuit Court instructed the jury, that the circumstances of the dispute ought not to subject the collector to more than nominal damages; to which exceptions were taken. The sole question on this subject was, whether the plaintiff was entitled to the damages he had actually sustained; and the Supreme Court held that he was so entitled. It was in reference to this question only, that the terms *exemplary* and *compensatory* damages were used; the question whether, in any case, damages could be given by way of punishment alone, not appearing to have crossed the minds either of the Judges or the counsel.

The last case cited by the author is that of the *Amiable Nancy*, 3 *Wheat.* 546, which was a libel for a marine tort, brought by neutrals against the owner of an American privateer for illegally capturing their vessel as prize, and for plundering the goods on board. The question was, whether the *owners* of the privateer, not having in any respect participated in the wrong, were liable for any damages beyond the prime cost or value of the property lost, and in case of injury, for the diminution of its value, with interest thereon; and the Court held that they were not, and accordingly rejected the claim for all such damages as rested in mere discretion. To what extent the immediate wrong-doers might have been liable, was a question not before the Court; yet it is to be noted, that, in the passing allusion which the learned Judge makes to their liability, he merely says that, in a suit against them, it *might* be proper to go yet farther, in the shape of exemplary damages, but he does not say that it *would* be; for his attention was not necessarily drawn to that point.

The case also of *Grable* v. *Margrave*, 3 *Scam.* 372, has been elsewhere adduced in support of the rule now controverted. It was an action upon the case, for seduction of the plaintiff's daughter, in which the Judge permitted the plaintiff to offer evidence both of his own poverty and of the pecuniary ability of the defendant; to which ruling the defendant took exception. And the Court held the ruling right, observing, that the father was entitled to recover not only for the loss of service, and the actual expenses, but for the dishonor and disgrace cast upon him and his family, and for the loss of the society and comfort of his daughter. Clearly this decision was in perfect consonance with the doctrine in the text, § 269; but the remark of the learned Judge who delivered the opinion of the Court, that "in vindictive actions, the jury are always permitted to give damages for the double purpose of setting an example, and of punishing the wrong-doer," was uncalled for by the case in judgment, and therefore cannot be imputed to the Court. In *Cook* v. *Ellis*, 6 *Hill N. Y. R.* 466, the question seems to have been between *actual* and *exemplary damages*, in the popular sense of those words. It was an action of trespass, for an assault and battery. The defendant had already been indicted and fined $250 for the act; and he insisted that this was a bar to all further claim of the plaintiff, "beyond *actual* damages;" but the Judge told the jury, that "these proceedings did not prevent them from giving exemplary damages, if they chose, though the fine and payment were proper to be considered, in fixing the amount to be allowed the plaintiff." The judgment is reported in a *per curiam* opinion; but it appears that the motion of the defendant for a new trial was denied; and the Court are reported as saying, among other things, that "smart-money allowed by a jury, and a fine imposed at the suit of the people, depend on the same principle. Both are penal, and intended to deter others from the commission of the like crime. The former, however, becomes incidentally *compensatory for damages*, and at the same time answers the purposes of punishment." From this and other expressions, it may well be inferred, that by *actual* damages the Court meant those which were susceptible of computation; and that by exemplary damages, or smart-money, they intended those damages which were given to the plaintiff for the circumstances of aggravation attending the injury he had received, and going to enhance its amount, but which were left to the discretion of the jury, not being susceptible of any other rule. But as a decision, the case extends no further than this, that in an action for trespass to the

person, the payment of a fine, upon a criminal conviction for the same offence, cannot go in mitigation of the damages to which the plaintiff is entitled. The case of *Johnson* v. *Weedman*, 4 *Scam.* 495, sometimes also cited, is still less to the point. It was trover for a horse, bailed to the defendant for agistment, and used by him without leave, but under circumstances entitling the plaintiff to no more than nominal damages. And the jury having found for the defendant, the Court refused to disturb the verdict.

From this examination of the authorities, adduced in support of the position that, in the cases alluded to, damages may be given purely by way of punishment, irrespective of the degree and circumstances of injury to the plaintiff, it is manifest that it has not the countenance of any express decision upon the point, though it has the apparent support of several *obiter dicta*, and may seem justified by the terms "exemplary damages," "vindictive damages," "smart-money," and the like, not unfrequently used by Judges, but seldom defined. But taken in the connexion in which these terms have been used, they seem to be intended to designate in general those damages only which are incapable of any fixed rule, and lie in the discretion of the jury; such as damages for mental anguish, or personal indignity and disgrace, &c., and these, so far only as the sufferer is himself affected. If more than this was intended, how is the party to be protected from a double punishment? For, after the jury shall have considered the injury to the public, in assessing damages for an aggravated assault, or for obtaining goods by false pretences, or the like, the wrong-doers are still liable to indictment and fine as well as imprisonment, for the same offence.

This view of the true meaning of these terms was taken by Smith, J., in *Churchill* v. *Watson*, 5 *Day R.* 144. It was trespass *de bonis asportatis*, committed with malice, and with circumstances of peculiar aggravation, to prevent the plaintiff from completing a contract for building a vessel. And the question was, whether the jury were confined to the value of the property taken, and presumptive damages for the force only; or whether they might consider all the aggravating circumstances attending the trespass, and the plaintiff's actual damage sustained by it. The Court held the latter. The learned Judge remarked that, "in actions founded in tort, the first object of a jury should be to remunerate the injured party for all the real damage he has sustained. In doing this, the value of the article taken or destroyed forms one item; there may be others, and in this case I think there were others." He then mentions the inter-

ruption and delay which occurred in building the vessel, as of the class of damages to which he alludes, and adds that he shall not attempt to draw the line between consequences which may properly influence a jury in assessing damages, and those which are so far remote and dependent on other causes, that they cannot be taken into consideration. "In addition," he observes, "to the actual damage," (meaning doubtless, from the connexion, the direct pecuniary damage above alluded to,) "which the party sustains in actions founded in tort, the jury are at liberty to give a further sum, which is sometimes called *vindictive*, sometimes *exemplary*, and at other times *presumptive* damages. These, from their nature, cannot be governed by any precise rule, but are assessed by the jury, upon a view of all the circumstances attending the transaction." He afterwards says: "Indeed, I know of no such thing as *presumptive* damages for *force*. It is a wrong, for which the law presumes damages, and the amount will depend on the nature, extent, and enormity of the wrong; but force partakes not of the nature of right or wrong, in such a manner that the law can raise any presumption." A similar view of the rule of damages in torts, had previously been taken by the Court in *Edwards* v. *Beach*, 3 *Day R.* 447, which was trespass for destroying a tavern-keeper's sign—the plaintiff claiming damages commensurate with the injury, and the defendant resisting all but the value of the sign. So in *Denison* v. *Hyde*, 6 *Conn. R.* 508, which was trespass for carrying away the plaintiff's vessel, the rule was held to be, that in tort, "not only the direct damage, but the probable or inevitable damages, and those which result from the aggravating circumstances attending the act, are proper to be estimated by the jury." So in *Treat* v. *Barber*, 7 *Conn. R.* 274, which was trespass, the defendant having broken open the plaintiff's chest, containing her wearing apparel, and used language in relation to the contents of it, that wounded her feelings; it was held, that these circumstances were proper to be considered by the jury, as aggravating the injury, and so increasing the damages. In *Merrills* v. *The Tariff Manuf. Co.*, 10 *Conn. R.* 384, which was an action on the case, the Court referred to the malice, wantonness, and spirit of revenge and ill-will, with which the act was done, and observed, that "these circumstances of aggravation may, with great propriety, be considered, in fixing the remuneration to which the plaintiff is entitled." The same view of the true meaning and limit of the term

"*vindictive damages*," was taken by Ld. Abinger, C. B., in *Brewer* v. *Dew*, 11 *M. & W.* 625, which was trespass for groundlessly seizing and taking the plaintiff's goods, *per quod* he was annoyed and injured in his business, and believed to be insolvent, and certain lodgers left his house, &c. The defendant pleaded the bankruptcy of the plaintiff in bar of the action; to which the plaintiff demurred; thus raising the question, whether the damages passed to the assignees. And the Ld. Ch. Baron said: "The substantial ground on which this case is to be decided is this,—whether, on this declaration as it stands, the jury could give vindictive damages, for the seizing and taking of the goods, beyond their value. For the breaking and entering, it is admitted that they might give damages beyond the amount of the actual injury"—(evidently meaning, beyond the injury to the property.) "Now I think, that under this declaration the plaintiff might give evidence to show, that the entering and seizure of the goods were made under false and unfounded pretence of a legal claim, and that thereby the plaintiff was greatly annoyed and disturbed in carrying on his business, and was believed to be insolvent, and that in consequence, his lodgers left him. Might not the jury then give vindictive damages for such an injury, beyond the mere value of the goods?" Here it is plain, that by "vindictive damages" the learned Judge intended only the damages which the plaintiff had sustained, beyond the value of the goods, and not those, if any, for any supposed injury to the public at large. Such also was plainly the sense in which Mr. Justice Story used this term, in *Whittemore* v. *Cutter*, 1 *Gall.* 483. "By the terms 'actual damages,'" said he, "in the Statute, (referring to the Patent Act,) are meant such damages as the plaintiffs can actually prove, and have in fact sustained, as contradistinguished to mere imaginary or exemplary damages, which, in personal torts, are sometimes given. In mere personal torts, as assaults and batteries, defamation of character, &c., the law has, in proper cases, allowed the party to recover, not merely for any actual injury, but for the mental anxiety, the public degradation and wounded sensibility, which honorable men feel at violations of the sacredness of their persons and characters." It seems superfluous to state at large the particular cases in which a similar rule has been laid down. It was emphatically but briefly stated by Williams, C. J., in *Bateman* v. *Goodyear*, 12 *Conn. R.* 580, which was trespass for an aggravated forcible entry, in these words: "What then is the principle upon which damages are given, in an

action of trespass? The party is to be indemnified for what he has actually suffered; and then all those circumstances, which give character to the transaction, are to be weighed and considered." He cites the case of *Churchill* v. *Watson*, and refers to *Bracegirdle* v. *Orford*, 2 *M. & S.* 77, where the circumstances of the entry into the plaintiff's house, namely, upon a false charge of concealment of stolen goods, to the injury of her reputation, were held proper for the consideration of the jury; Le Blanc, J., remarking, that "it is always the practice to give in evidence the circumstances which accompany and give a character to the trespass." The party is to be indemnified—nothing more. But every circumstance of the transaction, tending to his injury, is to be considered. At this limit the jury are to stop; a limit carefully marked by the Court in *Coppin* v. *Braithwaite*, 8 *Jur.* 875. They may weigh every fact which goes to his injury, whether in mind, body, or estate; but are not at liberty to consider facts which do not relate to the injury itself, nor to its consequences to the plaintiff. In other words, they cannot go beyond the issue, which is the guilt of the defendant, and the damage it did to the plaintiff; for this only did the defendant come prepared to meet. Such plainly was the principle of the decision in the cases already cited; as it also was in *Hall* v. *Conn. R. Steamboat Company*, 13 *Conn. R.* 320, which was case for an inhuman injury to a passenger; in *Southard* v. *Rexford*, 6 *Cowen R.* 254, which was for breach of a promise of marriage; in *Major* v. *Pulliam*, 3 *Dana R.* 582, which was trespass *quare clausum fregit;* and in *Rockwood* v. *Allen*, 7 *Mass.* 254, which was case for the default of the sheriff's deputy. In all these cases there were circumstances of misconduct and gross demerit on the part of the defendant, richly deserving punishment in the shape of a pecuniary *mulct*, and fairly affording a case for damages on that ground alone; yet in none of them do the Court intimate to the jury that they may assess damages for the plaintiff to any amount more than commensurate with the injury which he sustained. See also *Matthews* v. *Bliss*, 22 *Pick.* 48.

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The broad doctrine stated by Mr. Sedgwick finds more countenance from the bench of Pennsylvania, than in any other quarter; and yet, even there, it can hardly be said to have been *adjudged* to be the law, as may be seen by the cases decided. The earliest, usually referred to, *Sommer* v. *Wilt*, 4 *S. & R.* 19, which was an action on the case to recover damages for the malicious abuse of legal pro-

cess, in which the jury found for the plaintiff, assessing damages at $9,500. The case came before the Court in Bank, on a motion to set aside the verdict, on the ground that the damages were excessive; but the motion was refused, for the express reason, that "all the facts and circumstances" of the case "were fairly submitted to to the jury, to draw their own conclusions;" and that "there were circumstances from which the jury might have inferred malice, and evidence which satisfied them that the ruin of the plaintiff was occasioned by an act of oppression, and many aggravating circumstances of useless severity." The case, therefore, is in strict accordance with the rule as we have stated it, the damages being referred to the extent of the wrong done to the plaintiff. When, therefore, the learned Judge, in the course of his judgment, remarked, that the standard of damages in actions of that nature was "not even a matter of compensation to the party, but an example to deter others," the remark was not called for by the question before him, but was entirely extrajudicial. This case was cited, and its principle approved, in *Kuhn* v. *North*, 10 *S. R.* 399, 411, in which the Court granted a new trial because of excessive damages, in an action against the sheriff, where he honestly intended to perform his duty, and the jury were plainly mistaken.

The strongest case in favor of giving damages to the plaintiff beyond what he has sustained, is that of *McBride* v. *McLaughlin*, 5 *Watts* 375, which was trespass against a judgment creditor, for a wilful and malicious abuse of process, in the levy of his execution against two joint debtors, "under circumstances of peculiar injustice and oppression." It appeared that the oppression was in fact meditated not against the present plaintiff, but against the other debtor, to whom the property taken was supposed to belong, and that the present plaintiff had been joined in the judgment by mistake; and it was set aside as to him. The question was, whether the defendant's malice and misconduct in the transaction could be taken into the estimation of damages, inasmuch as it was not intended against the plaintiff. The Judge ruled that it might; and his ruling was sustained by the Court in Bank. There was no discovery of error or mistake by the creditor, and consequent apology, during the oppressive transaction; but the whole was carried out to its final consummation, in the most insolent and cruel manner. The case therefore falls within our rule, that the jury may consider all the circumstances affecting the plaintiff, either in mind, body, or

estate, and award him damages to the extent of the injury done *to him* in either of those respects. Surely, if A spits in B's face, on 'Change, it does not diminish the disgrace, nor, of course, the extent of the injury, for him afterwards to say that he mistook B for C. The crowd that saw the indignity may never come to the knowledge of this fact, nor does it lessen the pain inflicted upon his feelings at the time. In both cases, as in all others, the evidence is confined to the principal fact, with all its attending circumstances, stamping its character, and affecting the party injured. In the case we have just cited, however, the learned Judge does seem to place the decision of the Court on the ground that, in certain offences against morals, which would otherwise pass without reprehension, "the providence of the *Courts*" permits the private remedy to become an instrument of public correction. We say *seems* to place it; for he also uses expressions which equally indicate a reliance upon the rule which confines the jury to the evidence affecting the plaintiff alone. Such, for example, is the concluding sentence of his judgment: "The defendant was guilty of *wilful oppression*, and he is properly punished for *it*." Oppression of whom? Clearly of the plaintiff, and no other.

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It is worthy of remark, that in *Wynn* v. *Allard*, 5 *Watts & Serg.* 524, which was trespass for a collision of vehicles on the road, the same learned Court of Pennsylvania very properly held, that the drunkenness of the defendant was admissible in evidence to determine the question of negligence, where the proof was doubtful, but "not to inflame the damages." Why not, if it was "an offence against morals?" For it certainly must have been deemed such an offence. And in *Rose* v. *Story*, 1 *Barr R.* 190, 197, in trespass *de bonis asportatis*, where the jury had been allowed, in addition to the value of the property, to give such further damages as "*under all the circumstances of the case*, as argued by the counsel, they might think the plaintiff entitled to demand;" the same Court held the instruction wrong, as giving the jury "discretionary power, without stint or limit, highly dangerous to the rights of the defendant," and "leaving them without any rule whatever."

The subject of vindictive damages has recently been before several other American tribunals. In the Circuit Court of the United States, in *Taylor* v. *Carpenter*, 10 *Law Reporter*, *p.* 35, 188, which was case, for counterfeiting the plaintiff's marks on goods of the de-

fendant, in which Sprague, J., had instructed the jury to give exemplary damages, for the sake of public example; the verdict was allowed to stand, as it appeared that the jury had not given more damages than, upon computation, the plaintiff had actually sustained. But Woodbury, J., in giving judgment, referred to the doctrine as stated in 2 *Greenlf. Ev.* 242, and 3 *Am. Jur.* 287–308, without disapprobation; and Sprague, J., with great candor declared, that he had become satisfied that his ruling upon this point at the trial was wrong. In the Supreme Court of N. Y., in *Hitchcock* v. *Whitney*, (see 10 *Law Reporter* 189,) which was case, by a father, for an atrocious assault and battery upon his young daughter, the question directly in judgment was, whether, in the case of a wrong punishable criminally, by indictment, the plaintiff, in a civil action for the wrong, was entitled to recover greater damages than he could prove himself to have sustained; and the Court, having before it such of the foregoing discussions, as were published in the Law Reporter, vol. ix. p. 529–542, decided that he was not. The point was also incidentally ruled in the same manner by Cushing, J., in *Meads* v. *Cushing*, in the Court of Common Pleas in Boston. See 10 *Law Rep.* 238.

A QUESTION IN INSURANCE AGAINST FIRE.

"If the defence is that the *risk* has been *materially increased*, so as to render the policy void, the question whether, upon the facts proved, the risk is increased, is for the jury to determine. But it is not necessary for the defendant to show that any loss has resulted therefrom; for it is the change of circumstances and consequent increase of peril that absolves the underwriter, and not the actual loss." 2 *Greenlf. Ev.* § 408.

The only case referred to by the learned and able author, to support the doctrine contained in the last sentence, is *Merriam* v. *Middlesex Ins. Co.*, 21 *Pick.* 162. In this case a verdict was found for the defendants, and a motion was made by the plaintiff for a new trial.

Wilde, J., said: "The ground on which the jury found their verdict, was, that after the plaintiff had effected the insurance, and before the fire, the building insured had been altered by the tenants

of the plaintiff, and with his consent, in such a manner as to expose it more to the hazard of fire, and that thereby the *policy, by the terms of it,* was rendered *null and void.* The policy was made in pursuance of section 13 of the defendant's Act of Incorporation, (*Stat.* 1825, *c.* 141,) which provides, "that if any alteration should be made in any house or building by the proprietor thereof, after insurance has been made thereon with said Company, whereby it may be exposed to greater risk or hazard from fire, than it was at the time it was insured, then, in every such case, the *insurance* made upon such house or building *shall be void,* unless an additional premium and deposit, after such alteration, be settled with and paid to the Directors; but no alterations or repairs in such buildings, not increasing the risk or hazard, shall in any wise affect the insurance previously made thereon. This being the *contract between the parties,* in this particular there can be no question that the instructions to the jury were perfectly correct."

The instructions to the jury were, that if any alteration had been made by the plaintiff, or with his knowledge, so that a higher rate of premium would have been asked to insure the building, it could avoid the policy.

It is perceived that this case was decided upon the terms of the act (incorporating the Company) which formed the *express contract* between the parties.

Even admitting that Professor Greenleaf is right in the doctrine stated as above by him, he is not supported by the case which he cites. But I do not mean to discuss this question: it is merely suggested for examination. I have found no cases which support the text, and there are several directly against it. *Pim et al.* v. *Reid et al.*, 6 *Man. & Granger* 1; *Lounsbury* v. *Protection Insurance Company*, 8 *Conn. R.* 459; *N. Y. Equitable Insurance Company* v. *Langdon*, 6 *Wend.* 623; *Stebbins* v. *Globe Insurance Company*, 2 *Hall N. Y. R.* 647.

H. F.

CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF ILLINOIS, DECEMBER TERM, 1847—HELD BY THE HON. NATHANIEL POPE, DISTRICT JUDGE, &C.

EUSEBIUS MAYHEW *v.* SAMUEL H. DAVIS.

Under the Revenue Law of Illinois, passed Feb. 26, 1839, (the Circuit Court acting as a Court of limited and special jurisdiction,) it is necessary to show that every thing was done, and how done, that is required by law to be done, to give it jurisdiction.

A collector of taxes must make a *demand* for taxes upon the owner of land, before a judgment can properly be rendered against it.

THIS was an action of ejectment. The defendant pleaded a special plea, setting up a tax title, acquired since the commencement of the action,—in which plea he set out fully the record of the judgment of the Peoria Circuit Court against the land; the collector's report, on which judgment was rendered, together with notice and certificate of the publication thereof; the process or precept under which the land was sold by sheriff, and his deed from the sheriff to the land in controversy.

The collector's report was in the following form:

STATE OF ILLINOIS *v.* SUIT FOR TAXES.

List of Lands and other real estate situated in the county of Peoria and State of Illinois, on which taxes are due and remain unpaid, for the year one thousand eight hundred and forty-two.

Patentees.	Description.	No. of acres.	Valuation.	Taxes.
	do 9 N 7 E	100	do	do
Henry Martin,	N E 11 do	do	960	4 32
	do do	do	do	do

The costs already accrued on each of the foregoing tracts of land and town lots, are twelve cents.

Then follows the notice and certificate of publication, signed by John S. Zeiber, and endorsed on the back was a certificate of the collector, that said lands, &c. were assessed for taxes for the year 1842 for State and county purposes; that the taxes and costs thereon remain due and unpaid, and that the owners had no goods and chattels in his county on which he could levy for the payment of the same. The judgment and precept were in the form prescribed by statute.

To the defendant's plea, the plaintiff filed a demurrer, alleging for cause the want of jurisdiction in the Circuit Court to render said judgment, upon the facts set out in said plea. It was further agreed by the counsel, for the purpose of trying the question fully

and fairly before the Court, that the same objections might be made upon the demurrer, that could have been made to the record, &c., if the same were *offered in evidence.*

The following were the points made by the counsel for the plaintiff:

1. The record does not show that any demand was ever made by the collector for the payment of taxes, &c.

2. The judgment is void, being for a greater amount of taxes than the Court was authorized in rendering by the law, and by the facts before the Court.

The cause was argued by A. WILLIAMS and B. S. EDWARDS, for plaintiff, and O. PETERS and E. N. POWELL for defendant.

Judge POPE delivered the following Opinion:

This is an action of ejectment—special plea, setting up a tax title, under the act of the Legislature of Illinois, of the 26th February, 1839, "concerning the public revenue." The defendant exhibits the proceedings before the Circuit Court of Peoria County, the judgment, execution, sale and deed by the sheriff; also, the report of the collector, giving a list of the land; that the owner had no personal property out of which to levy the taxes, and notice that he would move for judgment against the land upon which the taxes were due and unpaid. To this plea the plaintiff demurred.

When I consider the vast amount of property depending upon the question involved in this suit, I cannot but feel the immense responsibility I incur: and this feeling is increased by the fact that my construction of the law is in conflict with that of the Supreme Court of Illinois, to whose *decisions* it is my duty to conform. I shall not attempt to overturn any of its decisions; but I dissent from its reasoning. That Court allows great latitude of presumption in favor of the acts of the officers and persons engaged in the collection of taxes; I, on the contrary, hold them bound to show that they have acted in strict compliance with the law from which they derive their power. That Court holds that some of the requirements of the law are *directory;* while I hold them to be material and essential.

The defendant claims to hold the land in controversy (valued by the assessor at $960,) by virtue of a sale, at which he paid less than $5 for it. This, then, is a claim of strict right, where a Court would not grant a new trial; nor would a Chancellor enforce such an unequal bargain.

But it is said that the State must raise taxes; and that cannot be done unless the Courts give to the sales a liberal support. This has not been found necessary in other States, or by the general government, and yet their faith has not suffered. Purchases of tax titles have been esteemed a good investment; for if the land be redeemed, it must be on the payment of a hundred per cent., and if not, the owner of the land almost always is willing to extinguish the tax title by paying a premium upon the advance. By the 8th article of the Constitution of Illinois, § 8, it is provided that no man's property shall be taken from him, but by the judgment of his peers, or the law of the land. The 20th section, same article, declares, that "the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of the property he or she has in his or her possession."

What is a tax? It is not a debt. It is a contribution or contingent, which the citizen should pay to the support of the government under which he lives. It is the right and duty of the government to ascertain its amount, and make requisition therefor. This is done by making an estimate of the expenses of the government, the value of each one's property, and levying the tax accordingly. To accomplish this, legislation is necessary.

So the people of Illinois, represented in General Assembly, by the act of 26th February, 1839, consented to a tax of 20 cents on the one hundred dollars' valuation of their property, and also, that the County Commissioners' Court might levy a tax for county purposes not exceeding 50 cents on the hundred dollars, if the Court should deem it necessary to defray the expenses of the county.

The tax is to be collected. The Legislature prescribes the *modus operandi.* One or more assessors for the county are to be appointed, whose duty it is to call upon each property holder for a list of his property—if not at home, a notice in writing must be left at his house, with some one over twelve years of age, notifying him to attend at some time and place specified in the notice, to give him a list of his taxable property. The list must be returned to the Clerk of the County Commissioners' Court, and shall contain the names of the owners, with the valuation annexed to each piece of property.

The next step is the appointment of a suitable person to act as collector;) this is the language of the law.) He is to call on the property holders for their taxes. If not paid, the tax payer is allowed twenty days to make payment, before the collector can em-

ploy coercion. This demand converts the tax into a *debt*, requiring the debtor to seek his creditor. The tax payer could not rest secure until the collector made the *demand*, which alone could put him default. Without demand, and neglect or refusal to pay taxes within twenty days, the collector could not proceed to levy on his goods and chattels, nor report him or his lands to the Court as delinquent. When the tax payer shall have failed to pay on demand, or in twenty days thereafter, the collector may levy on his goods and chattels; and if he can find none, then he may return or report against the land to the Court, and move for judgment.

It is here proper to pause on the inquiry, what is necessary to happen before the owner can be reported to the Court as being in default, and the motion made for judgment against his land? I answer, 1. The assessor must have listed his property for taxation; 2. He must have valued it. These two facts are material and essential; because, without them, no tax could be levied, as no one but the assessor, could take the list or value the property: without valuation no tax could be collected. In addition to this, two other facts are equally material and essential, viz.: 1. *Demand* by the collector; and 2. in default thereof, the collector must have levied on goods and chattels, if to be found. If all these things have been done, the then owner is in default. The collector is ready to bring his suit in the Circuit Court. The manner of doing this is to give notice of his intention to move for judgment for the sale of the delinquent property, and he is to make a report to the Court. The 25th section gives the form of the list to be reported, but not of the facts to show to the Court that the lands are subject to its jurisdiction. Those facts are to be found in the requirements of the law. Without the allegation of the necessary and material facts, to be set out in the report of the collector, the Court cannot render judgment.

For the present, we will suppose that the collector reported to the Court, that the assessor *listed* and *valued* the property, that he (the collector) demanded the taxes, which were not paid; that he then sought in vain for goods and chattels of the owner—what faith and credit should the Court bestow on the report? In other words, should the Court require the facts to be proved, or receive them as true until the contrary is shown?

This is a grave question, upon which I do not feel myself called upon to express an opinion. When it becomes necessary for me to pass upon it, I hope my health will be better than it is now.

It may not be out of place here to make some suggestions in re-

gard to it. The faith and credit to be bestowed on the report of the collector depend upon the character of this personage who is appointed as a *suitable person* to act as collector. Is he a common law officer of any Court? No. Does he form any part of the machinery of the common law? No. Are the duties general and permanent, or special and temporary? Special and temporary. Is his responsibility general? Special: this is to the State. His bond can only be sued for the use of the State. Is he not then an agent appointed by the State, for a particular object, and when that is accomplished, his agency ceases? Are not such agents bound to show that they have performed their duty, and how they have done it? But enough of this. These suggestions are thrown out to awaken inquiry.

I suppose the notice of the collector must be regarded as the process to bring parties before the Court—the report of the collector, the declaration. Now, what must appear in a declaration? I answer—the facts essential to a recovery. It is impossible to *presume* that the Court had proof before it, of any material fact not alleged in the declaration. Where the parties are properly before a Court of common law jurisdiction, and the Court is silent in regard to the evidence upon which it rendered its judgment, it will be presumed that the Court had proof of the truth of all the allegations of the declaration, but none other. It will not be supposed that the Court admitted, and acted on any matter *de hors* the declaration.

In the case at bar, the report of the collector avers the existence of only one of the material facts deemed by this Court necessary to a recovery, namely—that he could find no goods and chattels upon which to levy—omitting to state, unless inferentially, that the assessor *listed* and *valued* the property, and omitting altogether any allegation of *demand* and refusal to pay taxes.

But the Circuit Court does not allow the presumption, that it received proof of the facts omitted in the report, because it expressly bases its judgment upon the report alone. It must be held, that the omission to state a fact material and essential to a recovery, is proof that it does not exist: therefore no demand for the taxes was made by the collector. Hence, a judgment rendered upon that state of facts, is on an immaterial issue, and therefore inefficacious, even if rendered by a Court of general common law jurisdiction.

It is worthy of note, that the 43d section, which enumerates certain facts, some *prima facie*, and some conclusive, which are proved

by the sheriff's deed, does not include in either class *demand* by the collector. The existence of that *fact*, then, is not proved by the deed. That it is *material* and *essential* is too manifest to require proof. Indeed, it would be an insult to common sense to offer it.

The Court might here dismiss the subject, by deciding that the judgment and subsequent proceedings are void, because *coram non judice*, and therefore, no defence to the action.

It was argued for the defendant, that this is an action *in rem*, and not *in personam*. The Court does not see what conclusion can be drawn from this position, for, whether *in rem* or *personam*, the case must be brought legally before the Court before it can take jurisdiction, either of the *thing*, or person.

It was also urged with an earnestness indicative of sincerity, that, admitting the judgment to be erroneous, it is still binding until reversed; and a sale on the execution will be sustained, and the purchaser hold the property, even if the judgment be afterwards reversed. However this may be, where the Court has jurisdiction by having the *person* or *thing* properly before it, it does not hold, where the Court has not jurisdiction—(a judgment in that case is void, a perfect nullity)—and this is the case at bar. The Circuit Court had no jurisdiction.

The 43d section gives a force to the sheriff's deed truly alarming. It takes from the man whose property has been sold, almost all defence. It matters not how corruptly or negligently the assessor and collector may have acted, he cannot defend himself, unless by making it appear that the land was not liable to taxation, that the taxes were paid, that the land was not listed and assessed for taxation, etc., etc. I advert to this section to show how imperative it is on Courts to exact of the ministerial officers the greatest strictness in the performance of their duties, and require full proof that they have performed all the requirements of the law, and *how*.

But it is said that some of the requirements of the Legislature are only directory, and may be dispensed with. Upon this it may be remarked, that a Judge should rarely (if ever) take upon himself to say that what the Legislature required was *unnecessary*. He may not see the necessity of it: still it is unsafe to assume that the Legislature did not have a reason for it—perhaps it only aimed at uniformity. In that case the Judge cannot interfere to defeat that object, however puerile it may appear. It is admitted that there are cases where the requirements may be deemed directory. But it may safely be affirmed that it can never be, where the act, or the omission of it, can by any possibility work advantage or injury (how-

ever slight) to any one affected by it. In such case it never can be committed.

Does the Circuit Court, when executing the revenue law, act as a Court of common law? It does not. It acts as a Court of special and limited jurisdiction, and subject to the rules that govern Courts of that character. The Supreme Court of the United States has so decided in the case of *Thatcher* v. *Powell*, 6 *Wheat. Rep.* 119. In that case, Chief Justice Marshall, in delivering the opinion of the Court, says: "In summary proceedings, where the Court exercises an extraordinary power, under a special statute, prescribing a course, we think that course ought to be exactly observed, and those facts especially which give jurisdiction, ought to appear, in order to show that its proceedings are *coram judice*"—"previous to an order for the sale of lands for the non-payment of taxes, the sheriff is ordered to levy them by distress and sale of goods and chattels of the delinquent; and if there be no such goods and chattels, he is to report the same to the Court, as the foundation of any proceedings against the lands. By this act, no jurisdiction is given to the Court over the lands of a person who has failed to pay his taxes, until the sheriff shall report that there were no goods and chattels out of which the taxes may be made."

It was urged in that case, that although the judgment might be erroneous, yet it was binding until reversed: but the Court held it void. The Court held also, that it must appear that due notice was given. The case arose in Tennessee. There the report was made by the sheriff, (a common law officer, and an officer of the Court.) In the case at bar, the report was made by the collector, not an officer of the common law, or of the Court. In that case, the sheriff was held to a strict performance of his duty, and to afford evidence that he had done so.

In the case of *Walker* v. *Turner*, 9 *Wheat. Rep.* 541, the Supreme Court of the United States says, "if the judgment be void, an execution or order of sale founded on it, is also void." Again—the same Court, in the case of *Williams et al.* v. *Peyton's Lessee*, says: "In a sale of land for the nonpayment of taxes, the Marshal's deed is not even *prima facie* evidence that the prerequisites required by law have been complied with; but the person claiming under it must show positively that they have been complied with." The same doctrine has been maintained in Missouri, Indiana, Ohio, Virginia, and most of the other States. Indeed, no departure from it, or conflict with it, has been shown to this Court in the argument, and none is supposed to exist.

It was contended at the bar, that although the judgment be erroneous, still, until reversed, it will support the execution and sale. This is contradicted by the authorities just cited, and also by the case of *Dennings* v. *Corwin*, 11 *Wend. Rep.* 648–9, *&c.* In that case, the Supreme Court of the State of New York says, that the Court must have jurisdiction of the person and subject matter, or the proceedings will be void. This case was for partition of land; the judgment was held void because it did not appear that the requirements of the law were strictly pursued. The judgment was not erroneous, but *void.*

From the authorities here cited, and from numerous others, it appears that the Circuit Court, when executing the law of February 26th, 1839, concerning the revenue, acts as a Court of limited and special jurisdiction, and therefore bound to show that every thing was done, and how done, that is required by law to be done, to give jurisdiction. That the Legislature did not deem the Circuit Court, when executing the revenue laws, a Court of common law, is manifested by the fact that it furnished to the Court the forms for the judgment of final process, and farther, denied to it the power to try the cases according to the course of the common law, but to *hear and determine* them in summary manner without pleading." And yet it is said, that a Court so trammeled and supplied with manufactured forms, is a Court of common law jurisdiction, and entitled to all presumptions belonging to such Courts. This is truly preposterous. For the reason that no *demand* was made by the collector for the taxes upon the owner, and no reason given for its omission, the judgment of the Circuit Court, and other subsequent proceedings, are void. Therefore the law is with the demurrant.

It does not appear that this point was presented to or considered by the Supreme Court of Illinois, either in the case of *Atkins* v. *Hinman*, or *The People* v. *Taylor*, reported in 2 *Gilman.* Hence my opinion is not in conflict with those *decisions.*

Again, there is another fatal defect in the defence. By the collector's report, it appears that the land in controversy was valued by the assessor at $960: the judgment is for $4.44; the State tax amounts to only $1.92. I suppose the residue was for county purposes. But it no where appears that the County Commissioners' Court levied a tax at all. The power given to that Court was discretionary to levy a tax not *exceeding* fifty cents in the hundred dollars, or any sum less, or none at all.

This point also, does not seem to have been considered or decided by the Supreme Court of Illinois.

CAMPBELL'S LIVES OF THE LORD CHANCELLORS.

The Lives of the Lord Chancellors and Keepers of the Great Seal of England, from the earliest times till the reign of King George IV. By John Lord Campbell, A. M. F. R. S. E. Second Series, from the Revolution of 1688, to the death of Lord Chancellor Thurlow, in 1806. In two volumes, making vol. iv. and v. Philadelphia: Lea & Blanchard—1848.

This is a reprint by Lea & Blanchard of the second series of Lord Campbell's Lives of the Chancellors. On the publication of the first series, we gave a very favorable opinion of the work, and expressed the wish that on the appearance of these volumes, they should be immediately reprinted in this country. In this we have been gratified; and a hasty perusal of the work has satisfied us that it fully justifies our expectations. We shall make some extracts from the work itself, and also from a review of the work in the London Quarterly for January last, from which our readers will be able to form an opinion of the character of the book.

In all, the Chancellors and Lords Keepers, beginning with Augmendus, in A. D. 605, and ending with Lord Eldon, who died in 1838, are in number *one hundred and sixty-seven.* Of these high magistrates, only one appears to have come to a violent end while in office, viz., Simon de Sudbury, murdered by the mob in "Wat Tyler's riots,"—to borrow the gentle phrase of an ex-Attorney General; but More and several others were beheaded after resigning the Great Seal. During the last three hundred years, *six* have been impeached,—Wolsey, Bacon, Finch, Clarendon, Macclesfield, and Somers—which last one was acquitted.

Down to the time of Edward I., it was nothing uncommon to see a Chancellor who could not speak a word of English; but since then they have been born subjects of the British crown, and only one of them born in a colony, Lord Lyndhurst.

Lord Campbell might have presented us with one table exhibiting in a summary way the sort of pedigree and early education of the holders of the Great Seal, since the time when it came to be exclusively held by laymen, but he has not done it. The last clerical Lord Keeper was Bishop Williams, (1621–1625;) and we shall endeavor to supply the blank as to the subsequent series:

Coventry, was the eldest son of a Judge of the Common Pleas, and heir to a handsome fortune. *Oxford.*

Finch, son of an eminent barrister, one of an ancient and distinguished *famille de la robe.* No university mentioned either here or in Collins.

Littleton, a lineal descendant of the great Chief Justice—son of a Welsh Judge, and heir to a good estate. *Oxford.*

Lane, of obscure origin. Neither pedigree nor place of education ascertained.

Whitelocke, only son of an eminent and wealthy Judge of the King's Bench. *Oxford.*

Herbert, son and heir of a country gentleman of noble descent. *English University.*

Clarendon, son and heir of a considerable squire, and nephew of a Chief Justice. *Oxford.*

Shaftesbury, born to a baronetcy and 8,000*l.* a year; an immense fortune two centuries ago. An Earl and Cabinet Minister before he became Chancellor. *Oxford.*

Bridgeman, son to a bishop, and heir to a good fortune. *Cambridge.*

Nottingham, son and heir of an eminent and wealthy barrister, who was Recorder of London and brother to Lord Keeper Finch. *Oxford.*

Guilford, second son of the heir to a barony; but began the world in great poverty, and in his rise to the Seal owed little or nothing to his birth. *Cambridge.*

Jeffreys, younger son of a poor Welsh gentleman, who wished to bind him apprentice to a shopkeeper. *No public school nor university.*

Maynard, eldest son of a considerable squire. *Oxford.*

Trevor, second son of a very poor Welsh gentleman, but nearly related to Jeffreys. *No public school nor university.*

Somers, son of a country solicitor. *No public school nor university.*

Wright, son of an obscure clergyman. *Cambridge.*

Cowper, heir to a baronet of good estate. *No public school nor university.*

Harcourt, heir to a very honorable family, but miserably impoverished through the civil wars. *Oxford.*

Macclesfield, 'could not distinctly tell whether he had a grandfather;' his father a country solicitor. *Never at public school or university.*

King, son of a provincial shopkeeper. *Leyden.*

Talbot, eldest son of a bishop of noble descent. *Oxford.*

Hardwicke, 'son of a small attorney at Dover, of respectable character, but in very narrow circumstances.' *Never at public school or university.*

Northington, heir to a genteel family, but the estate grievously encumbered. *Oxford.*

Camden. His father was a Chief Justice, but died poor when he was only ten years of age. *Cambridge.*

'*Charles Yorke*, the second son of the great Lord Hardwicke, was born on the 10th of January, 1723, in a splendid mansion in Great Ormond-street. His father, then Attorney-General, and making a larger income than had ever fallen to the lot of an English barrister, continued near forty years afterwards to fill the highest offices of the law, accumulating immense wealth, and able to make a splendid provision for all the members of his family. Yet Charles, even under the enervating influence of a sinecure place which was conferred upon him,—from a noble love of honorable distinction, exerted himself as strenuously and perseveringly as if, being the son of a *poor Scotch clergyman*, who could give him nothing beyond a good education, he had depended entirely on his own exertions for his bread, and for his position in the world.' —vol. V., p. 367. *Cambridge.*

Bathurst, second son of an eminent politician, created an Earl, whose coronet eventually descended to him long after he had won for himself the Barony of Apsley. *Oxford.*

Thurlow, son and grandson of country clergymen; could carry his descent no higher—used to say among fine people that he believed the founder of the family was a carter. *Cambridge.*

Loughborough, son of a Scotch Judge, and heir to a small estate. *Edinburgh.*

Erskine, third son of a very poor Scotch Earl; entered at Cambridge in his twenty-sixth year; may be said to have been wholly self-educated.

Eldon, younger son of a provincial tradesman. *Oxford.*

We have enumerated thirty Chancellors or Lord Keepers: of these nineteen (probably Finch also—making twenty) had received what we call a regular gentleman's education at an English university, most of them having also been at great English schools; one had every advantage of instruction at Edinburgh in the brightest

days of that university ; another spent some time at a Dutch university ; a third was never matriculated at any university until he had reached the maturity of manhood—had a wife and children—and had been successively an officer in the navy and the army ; nine (perhaps *ten*) had never been at any public school or university whatever—and among these we find the splendid names of *Somers*, *Cowper*, *Macclesfield* and *Hardwicke*. The Oxford men are twelve ; of one Lord Campbell does not distinguish the university ; Cambridge claims only six ; but the balance of late years leans to her side as to all the honors of the Law. In the earlier part of our series only one rose from obscurity to the Great Seal—and the honorable but unfortunate *Lane* has, after all, but a shadowy claim to a place in the list ; he never ascended the marble chair—never tasted the sweets of its emolument. In the later period success, where there had not been the early pressure of the *res angusta domi*, is a very rare exception to the rule. Since the Revolution we can hardly place any in this category except *Talbot* and *Charles Yorke*—which last not only laboured in spite of wealth, but achieved greatness of his own in spite of the dangerous splendor of his father's still unrivalled fame. *Cowper* is but a *prima facie* exception. Of our thirty Chancellors eight belonged to families previously distinguished in the English law ; five were Judges' sons—but only two of these are since the Revolution—*Yorke* and *Camden*. The Scotch Law and Bench send one—*Loughborough*. The Seal has been held since the same date by two sons of country parsons—*Wright* and *Thurlow*—who could give them nothing but their education, and pinched themselves blue to give them that ; by two sons of country tradesmen—*King* and *Eldon ;* and by three sons of country attorneys—*Somers*, *Macclesfield*, and *Hardwicke*. There can be no offence in adding the chancellors subsequent to Lord Eldon—not one of whose epitaphs, we are sure, Lord Campbell wishes to write :

Lyndhurst, Son of a celebrated Royal Academician. *Cambridge.*
Brougham. Representative of a very ancient and honourable family, but inheriting a diminished estate. *Edinburgh.*
Cottenham. Second son of an eminent physician, who rose to a baronetcy, of which the Lord Chancellor is now heir presumptive. *Cambridge.*

Of the whole 167 Chancellors on record the great majority were themselves bishops. Since the last Bishop held the seals they have been in the hands of two bishop's sons (*Bridgeman* and *Talbot*), so that, in all, the Church, during the reigns subsequent to James I., has sent *four* to the Marble Chair. Physic appears to have supplied but one, and Art—we mean the artistical profession—no more.

Of the thirty since Bishop Williams, *one* was already a peer—*Shaftesbury : four* were *honorables*, of whom two ultimately *inherited* peerages—*Guildford*—Yorke—*Bathurst*—Erskine. Two inherited baronetcies—*Shaftesbury* and *Cowper*. We need hardly remind anybody that the two highest ranks in the peerage cannot immediately produce Chancellors. The bar is not considered a field for the son of a duke or marquis—and they are in like manner excluded from the most lucrative of all the learned professions, Medicine—circumstances over which we understand some Lord Johns and Lord Charleses have occasionally, in recent pinching times, been heard to grumble. In Physic a graceful Lord Charles (with a 'sweet bedside manner') might be very formidable ; and by degrees the awkwardness of the fee would be got over. As affairs go, it is somewhat rash for an earl to get himself lifted a step. How lucky for Erskine that he was not Lord Thomas ! The first movement, however, should be among the *honorables*. How long will they continue to think that it is anything but ignoble to be a clerk in a public office, with 100*l*. a-year to begin with, and no great chance of ever rising beyond a salary of 500*l*., or some petty commissionership or consulate ;—but that their blue *ichor* (owing its hue peradventure to some bed of city tin) would be contaminated by the position of a Halford or Brodie ? The awful difficulty of taking the fee has already been got over in their case. A patient's guinea could be no worse than an attorney's.

Lord Campbell dwells with just satisfaction on the high station in public esteem held by many families of Cancellarian nobility ; and he has compliments in abundance for some of the living heads of such houses ; but in his long list he cannot point to more than four Chancellors' sons who can be said to have at all distinguished themselves. Of these the second Earl of Macclesfield, though he attained considerable reputation as a student of the mathematics, and will always be remembered for the introduction of the New Style, appears, out of his diagrams, to have been a dull ordinary man ;—and the late Earl Bathurst, a most respectable and useful minister, never originated any great measure, nor led public opinion in any direction ; in short, the author of the 'Characteristics' and Charles Yorke form the only very conspicuous exceptions to the general law. Pope includes several names of the class in his Dunciad, and then exclaims :

> 'How quick ambition hastes to ridicule !
> The sire is made a peer, the son a fool.'

We suspect that if the matter were scrutinized, the general result

and its rare exceptions would equally tend to the confirmation of Napoleon's opinion that men commonly owe their intellectual endowments to the mother more than to the father. Most lawyers have married too early or too late in life—a mistress for passion or a housekeeper for convenience. Lord Hardwicke, in the right prime of eight-and-twenty, made an ambitious and politic alliance, though with a pretty woman, and all his biographers agree that she was a woman of remarkable abilities. 'Charles Yorke,' says our author, 'was, *like Lord Bacon*, most fortunate in his mother.' and though he was the only genius among her sons, the least of them would have been a star in any other family.

One of the most interesting rooms in England is that genuine fragment of the old Palace of Whitehall, the great dining-room at the Treasury in Downing Street—containing portraits of Lord Treasurers and First Lords, now a very extensive series. It is a pity that there is no similar series at the Foreign Office—at the Admiralty—at the Horse-Guards ;—but if the Cancellarian line from More to Lyndhurst were exhibited in one apartment, what a splendid procession it would be—what a field for the physiognomist! It is needless to say that they have been, with scarcely an exception, men of very extraordinary talents—but no rule, perhaps, admits fewer exceptions than that a great *physique* is indispensable for a great lawyer. Almost all of these have been of athletic mould—not a few of them giants in body as well as mind—capable of and delighting in labour that would have baffled or soon killed off punier aspirants ; addicted also to violent bodily exercise of some sort, and sustaining the eternal tear and wear of Herculean energies by abundant provender and still more copious potations. They have, moreover, been comely children of Anak—worthy to have been modelled by Roubilliac or Chantrey, and painted by a Velasquez or a Grant. Sir Christopher Hatton, we suppose, was the only Chancellor who owed his dignity to his beauty ; but if mere beauty had been the general principle for selection, not a few besides him might have left their effigies for the series that we desiderate. In various styles, but true specimens of the noblest of the human races, were—without we believe one exception—all the most illustrious of our Chancellors—Ellesmere, Bacon, Clarendon, Somers, Cowper, Hardwicke, Eldon. Not less so several of the secondary names from Harcourt to Erskine. Even Jeffreys must have been a fine looking man until the brandy took effect ; and we may say the like of Northington, whose countenance stood the battery longer, as he adhered to port, which could

never mar the Jove-like majesty of Thurlow's visage, nor the serene ivory of Eldon's beautiful lines.

As might be expected, and as all must be pleased to see established, he who is to reach the Marble Chair must, as the general rule, think of little but the law until eminence in his profession naturally invites or forces him to take an active part in politics. There are, however, several examples of men attaining the summit of legal ambition, although they had not settled themselves to legal study until after passing through a considerable period of dissipation; while others had given the vigour of early manhood to occupations more worthy, but still alien from the proper training for the woolsack.

Somers, though in boyhood noted among the friends of his domestic circle as an intellectual prodigy, did nothing to distinguish himself at school, nor while a young under-graduate at Oxford, and even after he was called to the bar he was thought of merely as a lively agreeable Templar; the boon companion of profligates of rank much above his own, loose enough in his personal morals, and with little of fixed principle of any sort about him, excepting the hereditary Whiggery. Suddenly, from some cause left in the dark, but most probably either a disaster at the gaming-table or a rebuff in love, he seems to have awakened as from a dream, rubbed his eyes, and perceived that the sun was high in heaven and he yet a waster of the light. At four-and-twenty the barrister quitted the Temple; broke off at one plunge from all the entanglements of his London society; went back to his college, and there voluntarily submitted himself to a regular course of study; a solitary man, with no company but his books and his old tutor. It was thus and then that he made himself the ripe scholar; it was thus also that he made himself the great civilian; the universal jurisconsult. When after the lapse of three or four years he re-appeared in town, he was seen to be another man; his father being a very prosperous solicitor at Worcester, he could not, now that he desired it, be long without some opportunity of showing what was in him; a few appearances were sufficient to fix him in plentiful practice; and although Lord Campbell observes that 'the aristocratic Whigs have ever been slow to associate with themselves in high office any one who cannot boast of distinguished birth' (IV., p. 98)—every subsequent step—with the woolsack and earldom at the close—may be easily accounted for by the surpassing strength of his faculties, his unwearied diligence and honourable bearing in his profession, and the sharp adroitness of his political movements—all on the winning side.

Peter King, a grocer's son, and sent about the streets of Exeter as soon as he could walk, with parcels of tea and sugar, was nevertheless a bookworm by nature—(his mother was Locke's sister)—and his parents at last gratified his inclinations by sending him to Leyden; but though he pursued his studies there with laudable ardour, there seems, from the direction they took, no reason to doubt the tradition that his views were fixed on the pulpit. He came back to England well seen in Hebrew and Divinity, and first made himself heard of by a ponderous treatise on the Primitive Church. But as his Dutch education had confirmed him in the Presbyterian tenets of his family, and those tenets were manfully upheld in his Treatise—as soon as Charles II. had settled himself on the throne, it was clear that Peter King, if he took to the sacred office, must do so as a Dissenter—a line which offered no chance of wealth or distinction such as this pious predestinarian had always steadily aspired to. He therefore, by Locke's advice, tried Physic; but that study, in whatever way he set about it, did not please him; so at the age of thirty he was numbered in the ranks of the Law; and poring on in this new line with the unflinching assiduity of a Dutch commentator, his character as a profound black-letter jurist was by and bye established. His Dissenting friends could help him in the Western Circuit, and he acquired good employment in Westminster Hall too.—Ten years after he was called to the bar we see him Sir Peter, Recorder of London, and one of the leading Whig counsel in the prosecution of Sacheverell. The rest followed very naturally.

Parker's early story is as striking. The son of a country attorney, he became an attorney at Derby himself, and so throve in his calling, that in no long time he had laid by as much money as he thought would be sufficient to support him for a certain number of years.—And then he determined to set all upon a cast; he gave up his business—entered himself at an inn of court—laboured in the higher branches of legal study most earnestly—and being at last called, and of course befriended by old friends among the solicitors, his progress was rapid. Within thirteen years he was Recorder of Derby and Member of Parliament for Derby, and of such eminence that the house appointed 'the silver-tongued Parker' one of the managers in the Sacheverell impeachment:—in which worthy concern he acquitted himself with higher applause than either Eyre or Jekyll or King; so much so that within the month—even before the judgment on Dr. Sacheverell was pronounced—he became *per saltum* Chief-Justice of England. Six years later he became Lord

Macclesfield—and after two years more he was promoted, most unfortunately for himself, from the King's Bench to the Marble Chair. Though by no means the only attorney's son among the Chancellors, he is the only one who had himself been an attorney. Indeed Lord Campbell observes that, though there have been a few 'splendid exceptions,' the failure of attorneys turned barristers is matter of proverb—the danger being, as he says, 'that a man who begins with the less liberal department of forensic procedure, may not be able to enlarge his mind so as to perform the duties of a good advocate, and that when pleading before a special jury or at the bar of the House of Lords, he may dwell earnestly on small and worthless points.' We are always glad to hear our author's *practical* remarks —a most keen observer of this world's doings he has ever been; and our readers will thank us for quoting also his speculations on the grand step of Parker in abandoning his business, 'which in extent and respectability equalled that of any attorney in Derbyshire:'

"We may imagine that, when the assizes came round, he was at first struck with immense awe at beholding the Judges in their scarlet robes, and could scarcely venture to speak to the leaders of the Midland circuit on delivering them briefs in the causes which he had entered for trial; that his reverence for these dignitaries gradually dwindled away; that he began sometimes to think he himself could have examined witnesses quite as well as the barristers employed by him, and even by making a better speech to the jury have won verdicts which they lost; that he was likewise hurt by the distance at which he was in public kept by all members of the superior grade of the profession, *while some of them were intensely civil to him in private;* that he thought it hard, having with great labour prepared a case of popular expectation so as to insure victory, another should run away with all the glory; that he measured himself with those who were enjoying high reputation as advocates and had the prospect of being elevated to the bench; that, possessing the self-respect and confidence belonging to real genius, he felt himself superior to them; and that he sickened at the thought of spending the rest of his days in drawing leases, in receiving instructions from country bumpkins to bring foolish actions, in preparing briefs, and in making out bills of fees and disbursements which any discontented client might tax before the Master. Whatever his train of feeling, or of reasoning, he resolved that he would quit his position."

Well for him if, quitting the position, he could also have quitted all the habits; and yet we agree with Lord Campbell in thinking that Macclesfield was hardly used in his impeachment. He had not originated any improper practice—he had only gone on in the line of his predecessors; and Sir Robert Walpole acted most shabbily in abandoning him—Walpole, whose whole government was notoriously, nay avowedly, carried on by means of bribes and corruption, and whose own immense accumulation of wealth during his tenure of office has never to this hour been in any shape or manner explained. The public were in a state of phrenzy at the explosion of the South Sea bubble. It was undeniable that Masters-in-Chancery had speculated with the suitors' funds. In the hope of the opportunity for such traffic the price hitherto given to the Chancellor for a

Mastership had been raised; and no one would believe that the *ci-devant* attorney had not been quite aware of the reason why his own commodity came to fetch a higher sum in the forensic market. The Earl of Macclesfield therefore was to be the scapegoat—and he literally retreated into the wilderness. He never again was visible in the upper world—he never more inhabited either his London mansion or the palace he had acquired in the country—but shut himself up in a small hired house in one of the wildest glens of his native Derbyshire. There is an overawing effect in real shame and confusion of face :—perhaps no circumstance in this book affects the reader more powerfully than the complete humility and darkness of this most energetic man's old age.

Of Parker's early refusal of an offer of the Great Seal from *the Tories*, Lord Campbell says:—

"He is much lauded for his virtuous self-denial, and it is sarcastically observed that "he is the first lawyer who ever refused an absolute offer of the Seals from a conscientious difference of opinion." I am very sorry to detract from his merit; but in the first place, principle not considered, he would have acted very foolishly to have given up his place of Chief Justice, which he held for life, in exchange for an office, the tenure of which would be very insecure; for till after Guiscard's desperate attempt, Harley expected almost daily to be turned out;—and at any rate such a sudden change to the High Church party by the most distinguished manager of the late impeachment, would have reasonably led to the conclusion that he would give his first piece of preferment to the "Doctor," and would have covered him with such infamy that he must have been *treated contumeliously by his colleagues, and kicked out by them whenever they wished to get rid of him.*'

—A notable *excursos*—to which we may as well append what our author says of Peter King's not ratting to the Tories on his first introduction to the House of Commons. Every word here carries double :—

"The Whigs, whose principles he approved of, were at this time very low. According to a very professional course followed before and since,—so often as to be free from lasting disgrace,—the ambitious young lawyer should have *ratted*—asserting that his old friends had changed their principles, and were now going such lengths as he could not consistently support;—but through good report and evil report he steadily adhered to the cause of civil and religious liberty. It happened in his instance that honesty led to prosperity, and he was applauded; but if he had failed, he would have been laughed at, and he would have seen successful renegades enjoying much more of general consideration than himself."—IV., p. 572.

But to come back to Parker—on his promotion to the Chancellorship (1718) we find a passage which will interest readers of the long robe—

"Notwithstanding his high reputation, the old Equity practitioners grumbled at his appointment, because he had not been trained to draw bills and answers, and had never regularly practised at their bar. Although occasionally he had been called in to assist them in cases of importance, his regular routine had been to ride the Midland Circuit, and to sit first in the Court of Queen's Bench, and then in the Court of Common Pleas, till he was made a Judge. Never having been Attorney or Solicitor General, he had never, even for a single term, transferred himself to the Court of Chancery. The consequence was, that although he was regarded generally as a 'dungeon of law,' yet by those who knew little beyond the technical rules of Chancery

pleading, it was thought he never could be made to understand them, and, therefore, that he was quite unfit for his office. He turned out to be *one of the greatest Equity Judges* who ever sat in the Court; and not only is he entitled to the *equivocal compliment* that none of his judgments were reversed, but his authority upon all points, whether of a practical or abstruse nature, is now as high as that of Nottingham, Somers, or Hardwicke."—IV., p. 523.

Cowper, already mentioned as almost a solitary instance of a Chancellor born to a title, may also be quoted among those who did not owe their rise to regular professional devotion *ab initio;* but he did not rise without feeling and obeying the stern spur of an empty purse. He became a Templar at eighteen, but without any notion of making the law his business. He was an exceeding dissolute, gay fellow, and seldom out of scrapes with women; he fell in with some black-letter Templars, who happened to be also pleasant companions, and from them he imbibed a taste for the antiquities and curiosities of the British Themis; but the attention he gave to these things was by fits or starts—he was, at best, a mere legal dilettante. However, he at last really fell in love, and though his family opposed him strenuously, he would marry the young lady of his honest choice. He did marry her in spite of them; but his father, the Hertfordshire baronet, was furious and inexorable. No supplies! There was nothing for it but to go to the Jews, or else get called to the bar, mount wig and gown in serious earnest—and win a livelihood like a man. He escaped the Mosaic temptation—perhaps he had already burnt his fingers; and with talents, manners, spirit, and by-and-bye learning of the first order, we need not wonder at the subsequent splendor of his career.

The only obstacle he had to overcome was the prevalence of a rumor which Swift has taken good care to immortalize in verse and prose, and not least by the *sobriquet* of *Bigamy Will;* and this, Lord Campbell admits, he could hardly have got over but for the potent advocacy of Sarah, Duchess of Marlborough, 'who, without scandal, was supposed to be much touched with the beauty of his person.' Voltaire, also, during his visit here, took up the story, and in due time gave it currency throughout Europe, not to the advantage of our national reputation for morality and decorum; for in the Philosophical Dictionary, under the word *Femme*, in the section entitled 'De la Polygamie permise per quelques Papes et par quelques Reformateurs,' we read these words: 'Il est public en Angleterre, et on voudroit le nier en vain, que le Chancelier Cowper epousa deux femmes, qui vecurent ensemble dans sa maison avec une concorde singuliere qui fit honneur a tous trois. Plusieurs curieux ont encore le petit livre que ce Chancelier composa en faveur de la

Polygamie.' Nay, Lord Campbell has been told that in another passage (which however he has not found) the Patriarch of Ferney writes, that 'to keep as many wives as one pleases is among the distinctive privileges of the English Chancellors, whence they are in common parlance called *Lord Keepers*.' Lord Campbell entirely rejects this imputation on Cowper, though he repeats, without disturbance of his muscles, the perhaps as marvellous story of another eminent equity lawyer of that age, who is said to have had two wives in separate parts of the town, but to have actually divided his night between them, lamenting to the one that his consultations forced him to stay late at the chambers, and to the other that his briefs summoned him to the Temple by 4 o'clock in the morning. His lordship, we say, rejects, not only the 'petit livre' of Voltaire's article, but the legend *in toto* :—according to him Swift did not merely heighten and circulate the charge—'nothing could satisfy the Dean's malignity but a sheer invention.' With great submission, Swift was too consummate a master in malignity for that—he knew better—it is the exaggerated and embellished slander that both hits and sticks. There were no two wives in the case, we well believe ; but we are afraid that during part of the second Lady Cowper's time there was also a concubine. Whether her ladyship was cognizant of the partnership is another question. Lord Campbell says if she had been so, there must have been some allusion to it in her Diary, which he has seen, and from which he gives some curious extracts ; but if—she on whatever grounds assenting to the arrangement—the peace of the 'home' was preserved systematically, the noble matron's diary is about the last record in which we should have expected to meet with any allusion to the fact. Lord Campbell, however, fairly inserts a letter from the Chancellor to his countess, in which he refers (she being then on a visit at a distance) to an overturn of his coach on the road from London to Hertfordshire, and adds—

"I thought I had before acquainted you with my design of carrying ye Lady you mention down with me, and therefore inferred yt from my writing she was here, you would inferr I did so : We were run upon a bank in ye dark, and ye coach was in some danger, as wee could just see, of falling in much lower ground. At that instant I could not but think of ye fable, wher ye man that's going to be cast away is pleased that ye end of ye boat wher his enemy sat was going to sink first. I would have taken care, I assure you, to have fallen as soft as I could, for my side would have been uppermost."

To the 'lady' in this passage our author gives a note at the foot of his page, in which he 'presumes the allusion is to a fat old housekeeper—not the simultaneous wife who, according to Voltaire, formed such an amicable trio with them ;' but we doubt if it was then, any more than now, the fashion for personages of that rank to take

their fat old housekeepers in their coaches with them—and perhaps there is something slightly awkward and, as it were, hesitative in his Lordship's method of bringing in the fact of 'the lady' having been his travelling companion. On the whole, we think Lord Campbell leaves this imputation where it was. Cowper, he is forced to allow, had been a great rake in his early days—and indeed he admits the truth of a story of the seduction and desertion of a well-connected young lady, which may probably seem to most of our readers a worse story than that of the 'amicable trio.' Nor could the Countess have been a particularly squeamish person on certain subjects—for while her husband held the Seals she herself had a place in the Royal household, and evidently cultivated with dutiful assiduity the society and good graces of the Hanoverian mistresses *en titre*.

Our author's legitimate heroes having been for the most part 'tall and proper men,' it is, perhaps, more to be regretted than wondered at that he finds occasion to exert himself in vindicating not a few of them from aspersions of amatory frailty. Worshipping Somers as he naturally does to idolatry, he is particularly anxious to clear him, and treats with almost fierce indignation the notion that this glory of Whiggery and Equity kept up in the fulness of his honors the habits of his Templarhood. There is no question that the illustrious penman of the Bill of Rights had among his contemporaries a very indifferent reputation as to this department of his manners—indeed the impression that his health was broken and his life abridged by such irregularities appears to be universally received. Lord Campbell, in whitewashing some of his 'Beauties,' lays great stress on the absence of any specific cases or names from the pages in which a general scandal has been transmitted. Perhaps this might be accounted for—if the amours happened to be humble ones—even with gentlemen of but ordinary tact, and without extraordinary motives for prudence. But as to Somers—who never was a married man, be it observed—he says,—

"He had for his housekeeper a Mrs. Blount, the wife of a tradesman at Worcester, and it was alleged that he lived openly with his lady as his mistress, behaving cruelly to the husband, and at last shutting him up in a madhouse. *Quibis indiciis, quo teste probavit?* This story, most improbable in itself, is supported only by the gratuitous assertion of bitter and unscrupulous enemies. The manners of the Court of Charles II. had passed away. William and Mary, and afterwards Anne and the Prince of Denmark, had exhibited to the world a picture of the domestic virtues; licentiousness was discouraged in the highest quarters, and the appearance of it was avoided by the most licentious. It is therefore utterly impossible that a grave magistrate like Somers, who, though firm in the discharge of his duty, always showed a solicitude to enjoy the good opinion both of the prince and the people, should have followed a course which was sure to draw down upon him the just censure of all ranks in the State; and the supposition is equally at variance with the prudence and good taste, as with the honor and religious feeling which we know belonged to him."—IV., p. 230.

No doubt, the cruelty to Mr. Blount was a wild fiction. For the rest, we have no objection to what is here said of Queen Anne ; but his lordship must have neglected the chronicles of her predecessor. William's infidelities in the morning of his married life at the Hague made his beautiful princess the unhappiest of women—but she learned patience. No Stuart or Hanoverian sovereign either maintained mistresses with less disguise than William did after the Revolution, or rewarded them (in one case at least) with more impudent profusion—nor was Catharine of Braganza or Caroline of Anspach a more perfect specimen of conjugal tolerance and submission than 'Good Queen Mary.'

Somers, the truth is, lived with all the wits of the time—our author dwells on his good taste in so doing—but we are afraid it might puzzle the apologist to point out a sincere Christian among the set, excepting Addison and Arbuthnot.

In the amatory section of Lord Hardwicke's biography the author is not obliged to assume any very strenuous attitude of defence. He quotes from the old Life by Cooksey this little story, which certainly proves that the lofty Earl either was not, or pretended not to be acquainted with the personal appearance of two much admired beauties of the irregular class :—

"He used to relate an incident that occurred to him in a morning ride from Wimple. Observing an elegant gentlemen's house, he conceived a wish to see the inside of it. It happened to be that of Mr. Montague, brother to Lord Sandwich, who, being at home, very politely, without knowing his lordship, conducted him about the apartments, which were perfectly elegant; and expatiated on the pictures, some of which were capital. Among these were two female figures, beautifully painted in all their native naked charms. "*These ladies,*" says the master of the house, "*you must certainly know, for they are most striking likenesses.*" On the guest's expressing his perfect ignorance, "*Why, where the devil have you led your life, or what company have you kept,*" says the Captain, "*not to know Fanny Murray and Kitty Fisher, with whose persons I thought no fashionable man like you could be unacquainted ?*" On the visitor's taking leave, and saying, "*I shall be glad to return your civilities at Wimple,*" what surprise and confusion did he express on his discovering he had been talking all this *badinage* to Lord Hardwicke."—vol. V., p. 165.

Lord Campbell dismisses this chapter with triumphant decision—

"He was one of the handsomest men of his time, and bestowed great attention to his appearance and dress. There were reports circulated of his gallantries with a Lady B——, and with the celebrated Mrs. Wells; but for these there was as little foundation as for his conjectured intimacy with Fanny Murray and Kitty Fisher. He was a *perfect pattern*, not only of temperance and sobriety, but also of conjugal fidelity."

Of Northington, also, we are told that 'he was a remarkably handsome man in his person ;' but nothing occurs as to love matters except a 'somewhat romantic attachment' at Bath, of which 'from his rattling, reckless manner, and his being a professed votary of the god 'ever fair and ever young,' he was supposed to be incapable,

but which led to a very happy wedding.' He had been a right potent toper both at All Souls and in the Temple :

"He afterwards so far reformed as not to allow his love of wine very seriously to interfere with the pressing busines of life, but many a severe fit of the gout was the result of his youthful indulgences. He was once heard, in the House of Lords, to mutter, after several hobbling and painful walks, with the purse in his hand, between the woolsack and the bar—If I had only known that these legs were one day to carry a Lord Chancellor, I'd have taken better care of them when I was a lad.

"His great delight was to find himself in a circle of lawyers, or common-place politicians, and to indulge in boisterous mirth and coarse jocularity. He seems himself to have possessed a rich fund of humour. Many of his sayings and stories used to be repeated by young students, when *'Twas merry in the Hall, and beards wagged all*,'—but would not be found suited to the more refined taste of the present age. He likewise indulged in a bad habit which seems to have been formerly very general, and which I recollect when it was expiring—of interlarding conversation with oaths and imprecations as intensitives—even without any anger or excitement. But in spite of these faults, into which he was led by the fashion of the times, he was a strictly moral, and even a religious man. He continued to live on terms of the utmost affection and harmony with his wife."

Lord Campbell dismisses this drinking, swearing, indecent, but strictly moral and religious Chancellor, by saying that even his dying words to his daughters were too gross to be printed ; but on the other hand—

"He was noted as a very steady and consistent politician, so that he did not derive the same benefit from the oblivion of his harangues which might have been enjoyed by some of his successors, who, in the discussion of important questions, have spoken with equal ability on both sides."—Vol. V., p. 182.

The stiff and sanctimonious King, the solemn Camden, the brilliant Charles Yorke, and the prematurely and proverbially grave Bathurst, pass before us without speck ; but there is an extract from the private Diary of the first of these which (since we have got into love stories) may not unsuitably be quoted here. If Lord King's Diary contains many more passages of the like curiosity, it surely deserves to be published :—

"*Monday, 2d, September* 1729, went to town. The next day saw the Queen at Court ; from thence went to Sir R. Walpole's in his chariot ; and dined with him and his lady only....On this occasion he let me into several secrets relating to the King and Queen—that the King constantly wrote to her by every opportunity long letters of two or three sheets, being generally of all his actions—what he did every day, even to minute things, and particularly of his amours, what women he admired....; and that the Queen, to continue him in a disposition to do what she desired, returned as long letters, and approved even of his amours ; not scrupling to say, that she was but one woman, and an old woman, and that he might love more and younger women. By which means, and a perfect subserviency to his will, she effected whatsoever she desired, without which it was impossible to keep him within any bounds."

'I have been obliged (says Lord Campbell) to omit some of the expressions imputed to her Majesty, as too coarse to be copied ;' and he adds : 'It is possible that the whole was the invention of Walpole, who over his wine might wish to mystify the Chancellor.' But this mystification cannot be charged against Walpole. The style of the King's letters from Hanover to his Queen is, we understand, not

only described but exemplified in the forthcoming Memoirs of Lord Hervey.

Thurlow's chapter is not by any means so easy, but Lord Campbell evinces every disposition to treat him gently :

"Thurlow was early in life honorably attached to an accomplished young lady, Miss Gooch—of a respectable family in Norfolk ; "but she would not have him, for she was positively afraid of him." He seems then to have forsworn matrimony. It is with great reluctance that I proceed ; but I should give a very imperfect sketch of the individual and of the manners of the age, if I were to try to conceal that of which he was not ashamed, and which in his lifetime, with very slight censure, was known to all the world. Not only while he was at the bar, but after he became Lord Chancellor, he lived openly with a mistress, and had a family by her, whom he recognized, and without any disguise brought out in society as if they had been his legitimate children. In like manner, as when I touched upon the irregularities of Cardinal Wolsey, I must remind the reader that every man is charitably to be judged by the standard of morality which prevailed in the age in which he lived. Although Mrs. Hervey is sometimes satirically named in the Rolliad and other contemporary publications, her *liason* with the Lord Chancellor seems to have caused little scandal. In spite of it he was a prime favorite, not only with George III. but with Queen Charlotte, both supposed to be very strict in their notions of chastity ; and his house was not only frequented by his brother the Bishop, but by ecclesiastics of all degrees,—who celebrated the orthodoxy of the head of the law,—his love of the Established Church,—and his hatred of the Dissenters. It should likewise be stated in mitigation, that he was an affectionate parent, and took great pains with the education of his offspring."

Note.—'When I first knew the profession, it would not have been endured that any one in a judicial situation should have had such a domestic establishment as Thurlow's, but a majority of the Judges had married their mistresses. The understanding then was, that a man elevated to the bench, if he had a mistress, must either marry her or put her away. For many years there has been no necessity for such an alternative. The improvement in public morals, at the conclusion of the eighteenth century, may be mainly ascribed to George III. and his Queen, who, though being unable to lay down any violent rule, or to bring about any sudden change, they were obliged to wink at the irregularities of the Lord Chancellor—not only by their bright example, but by their well-directed efforts, greatly discouraged the profligacy which was introduced at the Restoration, and continued, with little abatement, till their time."—Vol. V., p. 657.

It appears to us that Lord Campbell could hardly have penned the foregoing note, unless he had utterly forgotten the strain of his own observations when vindicating Somers *in re Blount.* He there assumed that the pure examples of William and Mary, and Anne and George of Denmark, had effected the reform which is here, and with more accuracy, traced to George III. and Queen Charlotte. But enough of the erotics of Thurlow ;—and the more doubtful parts of that Chancellor's religion we are willing to leave in Lord Campbell's merciful hands :

"It has been said that Thurlow was a sceptic ; but I do not believe that there is any foundation for this assertion, beyond the laxity of his practice, and an occasional irreverence in his expression on religious subjects—which, however censurable, were not inconsistent with a continuing belief in the divine truths he had been taught by his pious parents."

Thurlow was the earliest of these heroes that ever fell under the biographer's personal inspection, and we feel throughout the narrative how much life and verisimilitude are gained when the subject has

actually sat to the artist, though but once, and long before there could be any thought of the portraiture.

"With these eyes have I beheld the lineaments of Edward, Lord Thurlow; with these ears have I heard the deep tones of his voice.

"He had resigned the Great Seal while I was still a child residing in my native land; but when I had been entered a few days a student at Lincoln's Inn, it was rumored that, after a long absence from Parliament, he was to attend in the House of Lords, to express his opinion upon the very important question, "whether a divorce bill should be passed on the petition of the wife, in a case where her husband had been guilty of incest with her sister?"—there never hitherto having been an instance of a divorce bill in England except on the petition of the husband for the adultery of the wife.

"When I was admitted below the bar, May 20, 1801, Lord Chancellor Eldon was sitting on the woolsack; but he excited comparatively little interest, and all eyes were impatiently looking round for him who had occupied it under Lord North, under Lord Rockingham, under Lord Shelburne, and under Mr. Pitt. At last there walked in, supported by a staff, a figure bent with age, dressed in an old-fashioned grey coat,—with breeches and gaiters of the same stuff—a brown scratch wig—tremendous white bushy eyebrows—eyes still sparkling with intelligence—dreadful crow's feet round them—very deep lines in his countenance—and shrivelled complexion of a sallow hue—all indicating much greater senility than was to be expected from the date of his birth as laid down in the Peerage [1732].

"The debate was begun by his Royal Highness the Duke of Clarence, afterwards William IV., who moved the rejection of the bill, on the ground that marriage had never been dissolved, in this country, and never ought to be dissolved, unless for the adultery of the wife,—which alone forever frustrated the purposes for which marriage had been instituted. Lord Thurlow then rose, and the fall of a feather might have been heard in the House while he spoke. At this distance of time I retain the most lively recollection of his appearance, his manner, and his reasoning.

"'I have been excited by this bill,' said he, 'to examine the whole subject of divorce. Why do you grant to the husband a divorce for the adultery of the wife? Because he ought not to forgive her, and separation is inevitable. Where the wife cannot forgive, and separation is inevitable by reason of the crime of the husband, the wife is entitled to the like remedy. By the clearest evidence, Mr. Addison since the marriage has been guilty of incest with the sister of Mrs. Addison. Reconciliation is impossible. She cannot forgive him, and return to his house, without herself being guilty of incest. Had this intercourse with the sister taken place before the marriage, the Ecclesiastical Court would have set aside the marriage as incestuous and void from the beginning; and is Mrs. Addison to be in a worse situation because the incest was committed after the marriage, and under her own roof? You allow that she can never live with him again as her husband, and is she, innocent, to be condemned for his crime to spend the rest of her days in the unheard-of situation of being neither virgin, wife, nor widow? Another sufficient ground for passing the bill is, that there are children of this marriage, who, without the interference of the legislature, would be exclusively under the control of the father. Now, your Lordships must all agree that such a father as Mr. Addison has proved himself to be, is unfit to be intrusted with the education of a daughter. The illustrious Prince says truly that there is no exact precedent for such a bill; but, my Lords, let us look less to the exact terms of precedents than to the reason on which they are founded. The adultery of the husband while it is condemned, may be forgiven, and therefore is no sufficient reason for dissolving the marriage; but the incestuous adultery of the husband is equally fatal to the matrimonial union as the adultery of the wife, and should entitle the injured party to the same redress."

"I cannot now undertake to say whether there were any *cheers*, but I well remember that Henry Cowper, the time-honored Clerk of the House of Lords, who had sat there for half a century, came down to the bar in a fit of enthusiasm, and called out in a loud voice CAPITAL! CAPITAL! CAPITAL! Lord Chancellor Eldon declared that he had made up his mind to oppose the measure, but that he was converted; and Ex-chancellor Lord Rosslyn confessed that the consideration which had escaped him,—of the impossibility of a reconciliation—now induced him to vote for the bill. Having passed both Houses, it received the Royal assent, and has since been followed as a precedent in two or three cases of similar atrocity."—Vol. V., p. 473.

Would that Lord Thurlow had oftener found such a reporter!—

What strong clear sense, and what sterling English! We are sorry not to quote the most striking description of his mode of addressing the House of Lords, which occurs in Lord Brougham's Sketches; but we must keep our space for our Campbell, and give another favorable specimen of this Essay on Thurlow—to-wit, the account of his first start of professional success [1761]. Every reader of Cowper's Letters knows how little of labor apparently entered into his more fortunate companion's early course of life:

"According to legal tradition, soon after the decision of the Court of Session in Scotland that the alleged son of Lady Jane Douglas was a supposititious child purchased at Paris, the question, which excited great interest all over Europe, was discussed one evening at Nando's coffeehouse—which, from its excellent punch, and the ministrations of a younger daughter of the landlady, was Thurlow's favorite haunt. At this time, and indeed when I myself first began the study of the law, the modern club system was unknown; and (as in the time of Swift, and Addison) men went in the evenings for society to coffee-houses, in which they expected to encounter a particular set of acquaintance, but which were open to all who chose to enter and offer to join in the conversation, at the risk of meeting with cold looks and mortifying rebuffs. Thurlow, like his contemporary, Dr. Johnson, took great pains in gladiatorial discussion, knowing that he excelled in it, and he was pleased and excited when he found a large body of good listeners. On the evening in question, a friend of his at the English bar strongly applauded the judgment against the supposed heir of the house of Douglas. For this reason, probably, Thurlow took the contrary side. Like most other lawyers he had read the evidence attentively, and in a succinct but masterly statement he gave an abstract of it to prove that the claimant was indeed the genuine issue of Lady Jane and her husband,—dextrously repelling the objections to the claim, and contending that there were admitted facts which were inconsistent with the theory of the child being the son of the French rope-dancer. Having finished his argument and his punch, he withdrew to his chambers, pleased with the victory which he had obtained over his antagonist; and went to bed, thinking no more of the Douglas cause, and ready, according to the vicissitudes of talk, to support the spuriousness of the claimant with equal zeal. But it so happened that two Scotch law agents, who had come up from Edinburgh to enter the appeal, having heard of the fame of Nando's, had at a side-table been quiet listeners of the disputation, and were amazingly struck with the knowledge of the case and the acuteness which Thurlow had exhibited. The moment he was gone they went to the landlady and inquired who he was? They had never heard his name before; but finding he was a barrister, they resolved to retain him as junior to prepare the appellant's Case, and to prompt those who were to lead it at the bar of the House of Lords. A difficulty had occurred about the preparation of the Case, for there was a wise determination that from the magnitude of the stake, the nature of the question, and the consideration that it was to be decided by English law-lords, the *plaidoyer* should be drawn by English counsel, and the heads of the bar who were retained—from their numerous avocations—had refused to submit to this preliminary drudgery.

"Next morning a retainer, in *Douglas* v. *The Duke of Hamilton*, was left at Thurlow's chambers, with an immense pile of papers, having a fee indorsed upon them ten times as large as he had ever before received. At a conference with the agents (who took no notice of Nando's), an explanation was given of what was expected of him,—the Scotchmen hinting that his fame had reached the Parliament House at Edinburgh. He readily undertook the task, and did it the most ample justice, showing that he could command, upon occasion, not only striking elocution, but patient industry. He repeatedly perused and weighed every deposition, every document, and every pleading that had ever been brought forward during the suit, and he drew a most masterly Case, which mainly led to the success of the appeal, and which I earnestly recommend to the law student as a model of lucid arrangement and forcible reasoning.

"While so employed he made acquaintance with several of the relations and connections of the Douglas family, who took the deepest interest in the result; and, amongst others, with the old Duchess of Queensberry, the well-known friend of Gay, Pope, and Swift. When she had got over the bluntness of his manners (which were certainly not those of the *vieille cour*), she was mightily taken with him, and

declared that since the banishment of Atterbury and the death of Bolingbroke, she had met with no Englishman whose conversation was so charming. She added, that, being a genuine Tory, she had considerable influence with Lord Bute, the new favorite, and even with the young Sovereign himself, who had a just respect for hereditary right, lamenting the fate of the family whom his own had somewhat irregularly supplanted. On this hint Thurlow spoke, and, with the boldness that belonged to his character, said that "a silk gown would be very acceptable to him." Her Grace was as much surprised as if he had expressed a wish to wear a silk petticoat—but upon an explanation, that the wished-for favour was the appointment to the dignity of King's Counsel, in the gift of the Government, she promised that it should be conferred upon him. And she was as good as her word.—Vol. V., pp. 489—491.

To this Douglass Cause, then, Thurlow owed both his silk gown and his adoption of the Tory politics—whence the Great Seal in due season. The Duchess, who in early life enjoyed the society of Swift, was not likely to be much repelled by bluntness of manner in Thurlow. As to her alleged account of George the Third's views and feelings concerning the exiled Stuarts *at the beginning of his reign*, we should have liked to be told on what authority the statement is ascribed to her Grace ; but at the same time, were the story ever so clearly brought home to her, we must beg to be excused for slowness of acceptance. Duchess Kitty's eccentricity, even in her early period, was egregious; and Quevedo long ago observed, that if the girl squints with one eye the grandame will be likely to squint with two.

We conclude this article with an extract from Butler's Reminiscences, given by Lord Campbell in the 5th volume:

"At times," says Mr. Butler in his Reminiscences, "Lord Thurlow was superlatively great. It was the good fortune of the Reminiscent to hear his celebrated reply to the Duke of Grafton during the inquiry into Lord Sandwich's administration of Greenwich Hospital. His Grace's action and delivery, when he addressed the House were singularly dignified and graceful ; but his matter was not equal to his manner. He reproached Lord Thurlow with his plebian extraction and his recent admission into the Peerage : particular circumstances caused Lord Thurlow's reply to make a deep impression on the Reminiscent. His Lordship had spoken too often, and began to be heard with a civil but visible impatience. Under these circumstances he was attacked in the manner we have mentioned. He rose from the woolsack, and advanced slowly to the place from which the Chancellor generally addresses the House, then fixing on the Duke the look of Jove when he grasped the thunder, 'I am amazed,' he said in a loud tone of voice, 'at the attack the noble Duke has made on me. Yes, my Lords,' considerably raising his voice, 'I am amazed at his Grace's speech. The noble Duke cannot look before him, behind him, or on either side of him, without seeing some noble Peer who owes his seat in this House to successful exertions in the profession to which I belong. Does he not feel that it is as honorable to owe it to these, as to being the accident of an accident ? To all these noble Lords the language of the noble Duke is as applicable and as insulting as it is to myself. But I don't fear to meet it single and alone. No one venerates the Peerage more than I do ; but, my Lords, I must say, that the Peerage solicited me, not I the Peerage. Nay, more, I can say, and will say, that as a Peer of Parliament, as Speaker of this right honourable House, as Keeper of the Great Seal, as guardian of his Majesty's conscience, as Lord High Chancellor of England, nay, even in that character alone, in which the noble Duke would think it an affront to be considered—as a MAN—I am at this moment as respectable,—I beg leave to add, —I am at this moment as much respected—as the proudest Peer I now look down upon.' The effect of this speech, both within the walls of Parliament and out of them, was prodigious. It gave Lord Thurlow an ascendancy in the House which no Chancellor had ever possessed : it invested him in public opinion with a character of independence and honor ; and this, though he was ever on the unpopular side in politics, made him always popular with the people."

Miscellaneous.

THE LATE HENRY WHEATON.

Within the last few weeks, death has been unwontedly busy among the eminent men of our country. JOHN QUINCY ADAMS, AMBROSE SPENCER, and HENRY WHEATON—the last two pre-eminently connected with American jurisprudence—have just closed their earthly labors. At present we have space only for a biographical sketch of Mr. Wheaton, prepared for the Boston Daily Advertiser, by Charles Sumner, to whom we tender our thanks for a copy.

The death of a person like Mr. Wheaton naturally arrests the attention, even at this period of funereal gloom, when the angel of death seems to have overshadowed the whole nation with his wings. He was long and widely known in various official relations—devoted for many years to the service of his country—studious always of literature and jurisprudence—illustrious as a diplomatist and expounder of the law of nations—with a private character so pure as to incline us to forget, in its contemplation, the public virtues by which his life was filled.

He died after a brief illness, accompanied by a disease of the brain, on Saturday evening, March 11th, at Dorchester. On that day the remains of John Quincy Adams, who, as President of the United States, had first advanced Mr. Wheaton to a diplomatic place in the service of his country, were laid in their final resting place in the adjoining town of Quincy. The faithful friend and servant has thus early followed his venerable chief to the fellowship of another world.

The principal circumstances of Mr. Wheaton's life may be briefly told. He was born at Providence, on the 27th November, 1785. He was a graduate of Brown University, of that place, in 1802. After his admission to the bar, he visited Europe, particularly the continent, where his mind thus early became imbued with those tastes which occupied so much of his later years. Some time after his return—finding little inducement to continue the practice of the law at Providence—he removed to New York. This was in 1812. Here he became the Editor of an important journal, the *National Advocate*, a paper which, it is believed still exists, under the name of *The Courier and Enquirer*. His experience in this character closed May 15th, 1815. As a journalist, he is reputed to have been uniformly discreet, decorous, and able—at a time when the fearful trials of war, in which the country was engaged, added to the responsibilities of his position.

But his labors as Editor did not estrange him from the law. It was about this period that he became for a short time one of the Justices of the Marine Court, a tribunal which is said now to be shorn of something of its early dignity. In 1815, he appeared as an author of a treatise on Jurisprudence. This was a "Digest of the law of Maritime Captures and Prizes." In the judicial inquiries incident to the administration of the *laws of war*, still maintained by the Christian world, such a treatise was naturally of much practical utility. It may also claim the palm of being among the earliest judicial productions of our country. Nor, indeed, has it been without the disinterested praise of foreign nations. Mr. Reddie, of Edinburgh, in his recent

work on Maritime International Law, says, "that although it cannot be strictly called a valuable accession to the legal literature of Britain, it gives us much pleasure to record our opinion, that in point of learning and methodical arrangement, it is very superior to any treatise on this department of the law, which had previously appeared in the English language." No American contribution to jurisprudence so early as 1815, has received such marked commendation abroad. Kent and Story had not then entered upon their present freehold of European fame.

In 1816 he became the Reporter of the Decisions of the Supreme Court of the United States, which office he held till 1827. His Reports are in twelve volumes, and embody what, perhaps, may be called the *golden judgments* of our National Judicature, from the lips of Marshall, Livingston, Washington, Thompson, and Story.

It appears, however, that Mr. Wheaton's time was not absorbed by these official duties to the exclusion of other labors. He entered much into the practice of his profession. His name appears as counsel in important causes heard at Washington. He was the editor of divers English law books, republished in our country with valuable notes. On several literary occasions he pronounced discourses, which were of signal merit. One of these, in 1820, before the Historical Society of New York, touches upon his favorite theme, with which his name is now so firmly connected,—the law of nations; another in 1824, at the opening of the New York Athenæum, takes a rapid survey of American literature. In 1826 he published his life of that great lawyer, William Pinckney. It is also understood that during all this period, he was a frequent contributor to the North American Review.

Nor did these accumulated literary and juridical labors detain him from yet other services. He was a member of the Legislature of New York, and in 1821 held a seat in the Convention which remodeled the Constitution of that State. In 1825 he was placed on the commision for revising the Statutes of New York. It will be remembered that this was the first effort by any State professing the common law, to reduce its disconnected and diffusive legislation to the unity of a code. It is thus that Mr. Wheaton's name is connected with one of the most important land-marks in the history of American law.

All these duties and callings he relinquished in the summer of 1827, when he entered upon the diplomatic service, which then opened before him a new career of usefulness. It was then that he was made Charge des Affaires at Copenhagen, where he continued till 1834, when he was transferred by President Jackson to Berlin, as Minister resident. In 1837 he was raised by President Van Buren to the rank of Minister Plenipotentiary and Envoy Extraordinary at the same Court. On the 22d July, 1846, he had his audience of farewell from the King of Prussia, having been recalled by President Polk. This long period of service was passed abroad with the intermission of a brief passage of time in 1834, when he revisited his country on leave of absence.

During this protracted career in foreign countries, charged with responsible negotiations, he was not lost in the toils of office or in the blandishments of Courtly life. He was always a student. At Copenhagen he prepared his "History of the Northmen," or Danes and Normans, from the earliest times to the conquest of England by William of Normandy. This was published both in London and in our country in 1831. In 1836 it was much enlarged, and translated into French. At the time of his death he was occupied in preparing another edition for the press in our country. In 1838 he contributed to the Edinburgh Cabinet Library a portion of the volumes entitled "Scandinavia." By these works he has earned a place among the historical writers of the country. It will be observed that his History of the Northmen preceded, in time, the productions of Bancroft and Prescott, which have since achieved so much renown.

From literature he passed again to jurisprudence, where he has gained his surest triumphs. His "Elements of International Law" appeared in London and the United States in 1836; and again in 1846, much enlarged. This was followed by a History of the Law of Nations in Europe and America from the earliest times to the Treaty of Washington, which first appeared in the French, at Leipzig, in 1844, under the title of "Histoire du Progres du Droit des Gens en Europe depuis la Paix de Westphalie jusqu' au Congres de Vienne, avec un precis historique du droit des Gens Europeen avant la Paix de Westphalie." This was originally written for a prize offered by the French Institute. Though it received what was called "mention honorable," it failed to obtain the prize, which was awarded to a young Frenchman, whose production, as I have been informed, has never been published. It is possible that the constraint of a foreign language, in which Mr. Wheaton wrote, may have so far influenced his style as to place his work at a disadvantage before the polished French tribunal. But an enlightened public opinion has already awarded to it the crown of high merit. It has been much enlarged by the author, and published in the English language in an octavo volume of eight hundred pages.

Besides these classical treatises, Mr. Wheaton published an able and thorough Inquiry into the validity of the Right of Visitation and Search, particularly as recently claimed by Great Britain. On this occasion he upheld the views which had been put forth by the American Government. The acknowledged weight of his opinion in the science of law gave to his conclusions a commanding influence.

On his recent return to his country he was welcomed by many manifestations of regard, both public and private, in the principal places which he visited. Wherever he appeared he was a favored guest. At the last commencement of Brown University, he delivered the Address before the Phi Beta Kappa Society. His subject was "Germany." The various departments of thought and conduct, which have been successfully occupied by the "many-sided" mind of this country, were sketched with singular ability. His voice was feeble: and, as he spoke, large numbers of the audience drew near to the pulpit, filling the neighboring aisles, and standing in respectful attention, that they might better catch his learned discourse.

Such were the important and diversified labors of Mr. Wheaton's valuable life.—Without any of the adventitious aids of fortune, or of special favor, he achieved an eminent place before the civilized world. By virtue of his office, he lived as an equal among nobles and princes, while his rare endowments opened to him at will, the fraternities of learning and science. And yet his qualities were not those of the courtier. Nor did any heaven-descended eloquence lend its fire to his conversation or his style. Both were simple, grave, reserved, like his manners: attractive rather from their clearness and significance, than their brilliancy or point.

His career as a Diplomatist abroad has been one of the longest in our history—longer even than that of Mr. Adams. It was not his fortune to affix his name to any treaty, like that of 1783, which acknowledged our Independence, or that of Ghent in 1815, which restored peace to England and the United States. But his extended term of service was filled by a succession of wise and faithful labors which have rendered incalculable good to his own country, while they have impressed his character upon the public mind of Europe. His negotiation with Denmark was important. His careful management of the interests of our country, in connexion with the German Zoll Verein, was more important still. But besides these conspicuous acts, with which all are familiar, there is his long and constant correspondence with the Department of State at Washington, the true character of which is, probably, known to comparatively few.

It was his habit, contrary to the usage of many Ministers of the United States abroad, by regular authentic communications, to keep our Government at home ap-

prised of the true posture of Foreign affairs, as observed by him. It is believed, that all the matters which have prominently occupied the Continental nations—particularly those two disputes, sometimes known as the *Belgian question* and the *Egyptian question*, which seemed for a while to fill with "portents dire," the firmament of Europe, will be found to be discussed in these dispatches with most instructive fulness. These may be found in the archives of his legation, and in the Department of State at Washington—"enrolled in the Capitol," where they will doubtless be studied by the future historian.

His familiarity with the Law of Nations, derived from his position as a Diplomatist, was enhanced by his mature and thorough study of it as a science. For this he had been prepared by his training at the bar, the influence of which may be discerned in some of his discussions. He was master alike of its learning and its dialectics. It happened to him in Berlin to be called upon to defend the rights of ambassadors against an injurious usage established or recognized by the Prussian Government.—His paper on this occasion, it is believed, is still unpublished. All who have read it will attest the force and the sharpness of his unanswered argument. Strange that this task should have devolved upon an American Minister! Strange that the privileges of Ambassadors should have found their defender in a Cis-Atlantic citizen!—His defence drew the regard of the diplomatic body of Europe. Copies of it were transmitted to the different courts, where it was, as I have understood, discussed and generally if not universally sanctioned.

Justly eminent as a practical diplomatist, his works derived new value from the high place of their author, while the latter also was aided by his works. His was a solitary example in our age—perhaps the only instance since Grotius—of an eminent Minister, who was also an expounder of the science of the Law of Nations. His works, therefore, have been received with peculiar respect. Perhaps, they may be said already to have become authorities. Such they seem to be regarded by the two British writers on this subject, who have appeared since, Mr. Manning and Mr. Reddie. The former, in his most interesting Commentaries, says that "Dr. Wheaton's work is the best elementary treatise on the Law of Nations that has appeared;" while Mr. Reddie declares, in his Treatise on Maritime International Law, that "this work, although not by a British author, was certainly, at the date of its publication, the most able and scientific treatise on International Law, which had appeared in the English language." It is admitted that the arrangement is superior to that of Martens, Chitty, Schmalz, or Kluber.

It cannot be disguised, however, that both of his works in this department, are remarkable rather for their careful statement and arrangement of the subject, than for that elegance, or glow, or freedom of discussion, by which the reader is carried captive. It will not be questioned that his Elements afford the best view which has yet been presented of the Law of Nations, as practically illustrated in the adjudged cases of England and the United States, and in recent diplomacy. But we miss in them the fulness and variety of illustration which characterise some of the earlier writers, and especially that genial sentiment which interests us so warmly in Vattel. The *History*, which first appeared in *French*, is not less important than the *Elements*.—Here the field is more clearly his own. This work supplies a place which had never before been filled in the literature of the English language—if it had been in that of any language. To all students of jurisprudence—nay more, to all students of history, who ascend above the descriptions of wars and battles, to the grand principles, which in a certain sense are at once the parents and the offspring of events, this view of the progress of the Law of Nations will be an important guide.

Had Mr. Wheaton's life been longer spared, he would have found it his province, in the discharge of his recently assumed office as Lecturer on the Civil [Roman] and

International Law at Harvard University, to survey again the wide field of the Law of Nations. What further harvests he might then have gathered, it is impossible now to estimate. He never entered upon those labors. The reaper was removed, before he began to use his sickle.

Such was his life,—passed not without deserved honor at home and abroad. In those two great departments of labor, history, and the law of nations, he is among the American pioneers. Through him, the literature and jurisprudence of our country have been commended in foreign lands;

Fluminaque in fontes cursu reditura supino.

Others may have done better in the high art of history; but no American historian has like him, achieved European eminence as a writer on the Law of Nations; nor has any other American writer on the last great theme been recognized abroad as an historian. He was a member of the Institute of France; and I cannot forget that at the time of his admission, the question was entertained, by the late Baron Degerando, whether he should more properly be received into the section of History or Jurisprudence. It was to the latter that he was finally attached. Prescott and Bancroft belong to the former.

It is, however, as an expounder of the *Public* International Law that his name will be most widely cherished. In the progress of Christian civilization, many of the rules, now sustained by learned subtlety or unquestioning submission—shaping the public relations of States—may pass away. The Institution of War, with its complex code, now sanctioned and legalized by Nations, as a proper mode of adjusting their disputes, may yield to some less questionable form of Arbitrament. But a high interest will always attach to the writings of those great masters who have striven to explain, to advance, and to refine that system, which, though incomplete, has helped to constrain in the bonds of Peace the wide Christian Commonwealth. Among these, Mr. Wheaton's place is conspicuous. His name is already inscribed on the same tablet with that of Grotius, Puffendorf, and Vattel.

It were wrong to close this imperfect tribute, without a renewed testimony to the purity of his life. From youth to age his career was marked by integrity, temperance, frugality, modesty, industry. His quiet unostentatious manners were the fit companions of his virtues. His countenance, which is admirably preserved in the portrait by Healy, wore the expression of thoughtfulness and repose. Nor station, nor fame made him proud. He stood with serene simplicity in the presence of kings. In the social circle, when he spoke, all drew near to listen—sure that what he said would be wise, tolerant, and kind.

C. S.

Pledge of Stock—Right to sell. [Superior Court of New York—Before Judge Vanderpoel. Willoughby *v.* Mechanics' Banking Association.] Action of trover to recover 400 shares of the stock transferred by Mr. W. to the Mechanics' Banking Association in 1839, in security for a note and loan of $9,000, but which stock the Bank sold subsequently at 74¼. It was contended the proceedings of the Bank, in the sale of the stock, were irregular and void. This was denied, and after testimony and argument had been heard, a motion for nonsuit made. The Court granted the nonsuit on three grounds—1st, That it considered transfers of stock in security for the payment of notes, to be mortgages, and not pledges, the custom to the contrary notwithstanding. 2. That even if the stock was a pledge, the defendants have done all that devolved upon them to do. 3. That trover cannot lie, title having passed from plaintiff by the transfer, and by his having been credited with 74¼ per cent.

Law Reform in New York—Code of Procedure—Pleading. [We publish, without comment, a specimen of the Code just reported by the New York Commissioners. In the next number we hope to have some room for a discussion of this great movement.]

OF THE PLEADING IN CIVIL ACTIONS.

CHAPTER I.—THE COMPLAINT.

§ 118. All the forms of pleading heretofore existing are abolished; and hereafter, the forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, shall be those which are prescribed by this act.

§ 119. The first pleading on the part of the plaintiff is the complaint.

§ 120. The complaint shall contain—

1. The title of the cause, specifying the name of the Court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant:

2. A statement of the facts, constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended:

3. A demand of the relief, to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated.

CHAPTER II.—THE DEMURRER.

§ 121. The only pleading on the part of the defendant, is either a demurrer or an answer. It must be served within twenty days after service of the copy of the complaint.

§ 122. The defendant may demur to the complaint, when it shall appear upon the face thereof, either—

1. That the Court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties, for the same cause; or,

4. That there is a defect of parties, plaintiff or defendant; or,

5. That several causes of action have been improperly united; or,

6. That the complaint does not state facts sufficient to constitute a cause of action.

§ 123. The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be disregarded.

§ 124. After a demurrer, the plaintiff may amend, of course, and without costs, within twenty days. Upon the decision of the demurrer, the Court may, if justice require it, allow the plaintiff to amend, or the defendant to withdraw his demurrer, and to answer.

§ 125. If the complaint be amended, a copy thereof must be served on the defendant, who must answer it within twenty days, or the plaintiff, upon filing with the clerk an affidavit of the service, and of the defendant's omission, may proceed to obtain judgment, as provided by § 202; but, where an application to the Court for judgment is necessary, eight days' notice thereof must be given to the defendant.

§ 126. When any of the matters enumerated in § 122 do not appear upon the face of the complaint, the objection may be taken by answer.

§ 127. If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the Court over the subject of the action; and the objection that the complaint does not state facts sufficient to constitute a cause of action.

CHAPTER III.—THE ANSWER.

§ 128. The answer of the defendant shall contain—

1. In respect to each allegation of the complaint, controverted by the defendant, a specific denial thereof, or of any knowledge thereof sufficient to form a belief;

2. A statement of any new matter constituting a defence, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

§ 129. The defendant may set forth in his answer as many grounds of defence as he shall have. They shall be separately stated, and may refer to the causes of action which they are intended to answer, in any manner by which they may be intelligibly distinguished.

§ 130. If the answer set up new matter, which is not replied to as provided in the next section, and the action be tried on complaint and answer alone, and judgment be given thereon for the plaintiff, the Court may permit the defendant to withdraw or amend the answer, upon such terms as shall be just.

CHAPTER IV.—THE REPLY.

§ 131. When the answer shall contain new matter, the plaintiff may, within twenty days, reply to it, denying particularly each allegation controverted by him, or any knowledge thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended, any new matter not inconsistent with the complaint, in avoidance of the answer.

CHAPTER V.—GENERAL RULES OF PLEADING.

§ 132. No other pleading shall be allowed than the complaint, demurrer, answer, and reply.

§ 133. Every pleading must be subscribed by the party, or his attorney, and the complaint, answer and reply, must be verified by the party, his agent or attorney, to the effect that he believes it to be true. But the verification may be omitted, when the party would be privileged from testifying, as a witness, to the same matter. And no pleading, verified as herein required, shall be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading.

Gift—Sealed Bill—Consideration. The following rather singular case lately occurred in Philadelphia. Suddards *v.* The Executor of Greenfield. The plaintiff brought suit on a sealed bill for $6,000, dated in the year 1835, and executed by the late Mrs. Greenfield. The defence made was, that as the bill was given without consideration, it could not be enforced. The plaintiff, the Rev. W. L. Suddards, admitted that there had been no money consideration for the bill. The following are briefly the circumstances of the case. Mrs. Greenfield, an aged lady of wealth, well known in this city for her numerous charities, gave the bill, regularly attested, to the plaintiff, without his previous knowledge, as a substantial evidence of her regard for him, who frequently rendered her spiritual services, and gave her his aid in the distribution of her charities. Some time after, at Mrs. Greenfield's request, her Trustee was applied to for the payment of the bill, but he refused to do so until Mrs. G. should die. Mrs. G. had been very anxious, up to the time of her death, for the payment of the bill. Mr. Meredith appeared for Mr. Suddards, and took the ground that the spiritual services rendered by Mr. S. were sufficient consideration to support a parol promise. Judge Bell charged that the sealed bill imported a consideration, and that, unless the defendant proved mistake or fraud, there was no defence. The jury returned a verdict of $10,000, being the principal and interest due on the bill for the plaintiff.